

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(1) INTRODUCTION/1. Procedure on the sale of land.

## **SALE OF LAND (VOLUME 42 (REISSUE))**

### **1. THE CONTRACT AND PRELIMINARY MATTERS**

#### **(1) INTRODUCTION**

##### **1. Procedure on the sale of land.**

A sale of land often falls into four distinct stages: (1) the pre-contractual stage<sup>1</sup>; (2) the contractual stage<sup>2</sup>; (3) the completion stage<sup>3</sup>; and (4) the post-completion stage<sup>4</sup>. At each stage it will be necessary to consider particular aspects of the transaction.

Where the contract is by private treaty<sup>5</sup>, the first stage is mainly concerned with the fixing of the price, but certain other matters are of importance<sup>6</sup>. The purchaser frequently enters into a preliminary agreement by which he agrees to buy the land from the vendor at a price stated in the agreement. The preliminary agreement is usually expressed to be subject to contract, in which event, until formal contracts are exchanged, either party may retire from his bargain, even without giving a reason for so doing<sup>7</sup>. Such a preliminary contract is often accompanied by the payment of a nominal deposit, the balance of the full deposit being paid when the formal contract is signed<sup>8</sup>.

After the preliminary agreement has been signed, the draft contract is prepared by the vendor<sup>9</sup> and an inspection of the property (if it has not been inspected before the signing of the preliminary agreement) and preliminary inquiries and searches<sup>10</sup> are made by the purchaser before signing the contract<sup>11</sup>, so as to ensure that he can safely enter into the contract<sup>12</sup>. It is normally advisable for the purchaser to have a survey of the property made<sup>13</sup>.

The description of the property in a contract for sale of land, and of any exceptions and reservations, or rights to be enjoyed, such as rights of drainage or light or other easements, and the terms of any covenants to be inserted in the transfer, should be most carefully prepared as, in general, these must be included subsequently in the transfer in the precise terms in which they appear in the contract<sup>14</sup>.

The time when the deposit is payable is a matter of arrangement; it will normally be payable not later than the time of the signing of the contract and, if a nominal sum has been paid on a preliminary agreement, a deduction is made in respect of the sum so paid<sup>15</sup>.

1 See PARAS 4-22 post.

2 See PARAS 23-261 post.

3 See PARAS 262-325 post.

4 See PARAS 326-359 post.

5 On a sale by auction, the sale is subject to conditions of sale which have been prepared before the auction, and the purchaser must satisfy himself and preferably take legal advice that the conditions are such as he can in the circumstances accept and be bound by. As to conditions on sales by auction see PARAS 84-85 post; and see generally AUCTION vol 2(3) (Reissue) PARA 236 et seq.

6 It may be desirable at this first stage to consider the applicability to the proposed transaction of capital gains tax (see CAPITAL GAINS TAXATION vol 5(1) (2004 Reissue) PARA 3 et seq), inheritance tax (see INHERITANCE TAXATION vol 24 (Reissue) PARA 402 et seq), income tax (see INCOME TAXATION vol 23(1) (Reissue) PARA 1 et seq), and value added tax (see VALUE ADDED TAX vol 49(1) (2005 Reissue) PARA 1 et seq).

7 See CONTRACT vol 9(1) (Reissue) PARA 671; *Cohen v Nessdale Ltd* [1982] 2 All ER 97, [1982] 1 EGLR 160, CA. As to the position where the agreement is subject to a condition, for example the obtaining of finance or a satisfactory survey see PARA 26 post.

8 As to giving credit for such a deposit see the text to note 15 infra.

9 The draft contract of sale now commonly incorporates the Standard Conditions of Sale (3rd Edn). Prior to 21 March 1990, two forms of standard contract were in general use in England and Wales: the Law Society's Conditions of Sale, and the National Conditions of Sale. In practice the choice of using one set of conditions in preference to the other tended to be governed by habit or tradition rather than being based on a reasoned decision that one set of conditions suited a particular transaction better than the other. Since 21 March 1990, a third standard form contract called the Standard Conditions of Sale has been in use and is now in its third edition. The Standard Conditions of Sale (3rd Edn) were published in 1995. The new conditions emerged as a result of a merger between the Law Society's Conditions of Sale (1984 Revision) and the National Conditions of Sale (20th Edn) and are intended to replace both of these former sets of conditions, neither of which will again be published or revised. New editions of the Standard Conditions have indicated this by means of a sub-heading. So, the third edition is sub-titled 'National Conditions of Sale 23rd Edition, Law Society's Conditions of Sale 1995'. The Standard Conditions of Sale are designed to be used in both domestic and commercial transactions. However, a version of the Standard Conditions of Sale designed specifically for the sale of commercial land is due to be published in the summer of 1999.

10 These searches do not at this stage normally include a search for land charges as distinct from local land charges: see PARAS 19-22 post.

11 See PARA 4 et seq post. The practice is to deliver preliminary inquiries, requisitions and the draft transfer in duplicate, so that the vendor has a copy for his own use.

12 In approving the draft contract the purchaser should hesitate in accepting a title of less than the full statutory length of 15 years because he is deemed to have notice of everything he would have discovered if he had investigated the title for the statutory period (see PARA 90 post), and because, if he requires to finance the purchase by a mortgage, the mortgagee may insist on a full 15 year title. As to the statutory length of title see PARA 139 post.

13 As to the survey see PARA 7 post.

14 As to covenants in the transfer see PARA 81 post; and DEEDS AND OTHER INSTRUMENTS. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

15 See PARA 86 post.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

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## 2. Procedure after signing contract.

Upon the signing of the contract, the vendor prepares the abstract of title<sup>1</sup> and delivers it to the purchaser in accordance with the terms of the contract<sup>2</sup>. The purchaser then makes his

requisitions on title and in some cases the draft transfer is delivered with the requisitions but, if its form depends upon the answers to the requisitions, its delivery must be deferred to a later stage<sup>3</sup>. Formerly, there were special requisitions on title and also what were termed general requisitions. The matters to which general requisitions related are now the subject of the preliminary inquiries and at the later stage when requisitions are delivered it may be sufficient merely to ask whether the answers to the inquiries are still true and complete in all respects<sup>4</sup>.

It is necessary to search the registers again before completion, and these searches, which include searches in the land charges register as well as other necessary searches, must be made immediately before completion in order to secure priority over subsequent registrations<sup>5</sup>. It may be advisable in the case of land apparently unregistered to search at the Land Registry to ensure that the land has never in fact been registered<sup>6</sup>.

The transfer when finally agreed is engrossed by the purchaser, the vendor delivers to the purchaser a completion statement<sup>7</sup>, showing the balance actually due from the purchaser to the vendor<sup>8</sup>, and this balance is then paid over and the transfer executed<sup>9</sup>.

After transfer the remedies of the parties are very restricted<sup>10</sup>.

1 As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 post.

2 As to the delivery of the abstract of title see PARAS 100-101, 138 post.

3 As to requisitions on title see PARAS 163-166 post. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

4 As to the nature of requisitions see PARA 164 post. Apart from this request for confirmation, requisitions on title now relate almost entirely to matters of title and conveyance.

5 As to searches see PARAS 167-169 post.

6 As to index maps searches see LAND REGISTRATION vol 26 (2004 Reissue) PARA 1111. See also Greene 'Searches Before Contract' (1960) 110 Ljo 147; and Garner 'The Control of Development Bill' (1960) 110 Ljo 280. As to searches to be made when the land is known to be registered see PARA 169 post.

7 This is done as a matter of custom and practice; there is no legal obligation to provide a completion statement: *Carne v Debono* [1988] 3 All ER 485, [1988] 1 WLR 1107, CA. Where the only money payable on completion is the balance of the purchase price, a formal completion statement is often dispensed with: see *Carne v Debono* supra.

8 This debits the purchaser with the total purchase price and any outgoings, such as council tax or rates, which may have been paid by the vendor, so far as they relate to the period after the date at which outgoings are apportionable. It credits the purchaser with any deposit which he may have paid, any sums (eg rent in advance where the property is let) which may have been received by the vendor so far as received in respect of the period after the date of apportionment, and any sums (eg rates) which the purchaser may have subsequently to pay, so far as they will relate to the period before that date. As to the date at which rents and profits and outgoings are apportionable see generally paras 124-125 post.

9 As to the stamping of transfers see PARAS 318-319 post; and STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1027 et seq. As to registration of dispositions of registered land and the effect of registration see LAND REGISTRATION vol 26 (2004 Reissue) PARAS 911 et seq, 934 et seq.

10 As to these remedies see PARAS 352-359 post; and as to remedies under the implied covenants for title see PARA 343 et seq post.

## UPDATE

### 1-136 The Contract and Preliminary Matters

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relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

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### **3. Conveyancing services.**

Traditionally, conveyancing services have been provided by solicitors<sup>1</sup>, but such services may now also be provided by licensed conveyancers<sup>2</sup>.

It is an offence, subject to certain exceptions<sup>3</sup>, for unqualified persons to draw or prepare any instrument of transfer or charge for the purposes of the Land Registration Act 1925, or to make any application or lodge any document for registration under that Act at the registry, or to draw or prepare any other instrument relating to real or personal estate, or any legal proceeding<sup>4</sup>. In addition an individual must not describe himself or hold himself out as a licensed conveyancer unless he holds a licence<sup>5</sup> which is in force under Part II<sup>6</sup> of the Administration of Justice Act 1985<sup>7</sup>. Provision is made in Part II of the Administration of Justice Act 1985<sup>8</sup> for the purpose of regulating the provision of conveyancing services<sup>9</sup> by persons who hold licences in force under that Act<sup>10</sup>. The statutory restriction<sup>11</sup> on a person preparing certain instruments when not qualified to act as a solicitor does not apply to any act done by a licensed conveyancer in the course of the provision of any conveyancing services if he is not precluded<sup>12</sup> from providing those services as a licensed conveyancer<sup>13</sup>.

1 As to solicitors generally see LEGAL PROFESSIONS.

2 For the meaning of 'licensed conveyancer' see LEGAL PROFESSIONS vol 66 (2009) PARA 1319.

3 See the Solicitors Act 1974 s 22(2) (as amended), s 22(2A) (as added): see LEGAL PROFESSIONS vol 65 (2008) PARA 595.

4 See *ibid* s 22(1) (as amended); and LEGAL PROFESSIONS vol 65 (2008) PARA 595. As to offences under the Solicitors Act 1974 see LEGAL PROFESSIONS vol 65 (2008) PARAS 589-593. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

5 For the meaning of 'licence' see LEGAL PROFESSIONS vol 66 (2009) PARA 1319.

6 *Ie* the Administration of Justice Act 1985 Pt II (ss 11-39) (as amended): see LEGAL PROFESSIONS vol 66 (2009) PARA 1319 *et seq*.

7 *Ibid* s 35(1). As to the penalty for contravention of s 35(1) see LEGAL PROFESSIONS vol 65 (2008) PARA 598.

8 See note 6 *supra*.

9 For the meaning of 'conveyancing services' see LEGAL PROFESSIONS vol 66 (2009) PARA 1319.

10 Administration of Justice Act 1985 s 11(1).

11 *Ie* under the Solicitors Act 1974 s 22(1) (as amended): see the text to note 4 *supra*; and LEGAL PROFESSIONS vol 65 (2008) PARA 595.

12 *Ie* precluded by any conditions imposed as mentioned in the Administration of Justice Act 1985 s 16(3)(a) (see LEGAL PROFESSIONS vol 66 (2009) PARA 1330): s 11(4).

13 *Ibid* s 11(4).

### **UPDATE**

## **1-136 The Contract and Preliminary Matters**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

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## **(2) INQUIRIES AND SEARCHES BEFORE CONTRACT**

### **(i) Inquiries and Inspection**

#### **A. IN GENERAL**

#### **4. Conditions designed to render inquiries unnecessary.**

Although the usual practice is now for the purchaser to make inquiries and searches before entering into a formal or binding contract<sup>1</sup>, it is possible to draft conditions of sale designed to enable a binding contract to be entered into without certain kinds of preliminary inquiry. These would entitle the purchaser to rescind if the property proves to be subject to specified matters which, under the usual procedure, might have been discovered by preliminary inquiries and searches<sup>2</sup>. It is only in cases of exceptional urgency that acceptance of such conditions is to be recommended.

<sup>1</sup> As to inquiries see PARA 5-18 post; and as to searches see PARAS 19-22 post.

<sup>2</sup> There is no such condition in the Standard Conditions of Sale (3rd Edn). Cf the previously used National Conditions of Sale (20th Edn), conditions 3, 15(3); and The Law Society's Contract of Sale (1984 Revision), condition 4; and see also *Aquis Estates Ltd v Minton* [1975] 3 All ER 1043, [1975] 1 WLR 1452, CA. As to the Standard Conditions of Sale see PARA 1 note 9 ante.

## **UPDATE**

## **1-136 The Contract and Preliminary Matters**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

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#### **4A. Home information packs.**

## 1. Duties of a responsible person where a property is on the market

Where a residential property<sup>1</sup> is on the market<sup>2</sup>, a person responsible for marketing the property is subject to specified duties relating to home information packs<sup>3</sup> until his responsibility ceases<sup>4</sup>. For the purposes of the provisions relating to home information packs<sup>5</sup>, references to a 'home information pack', in relation to a residential property, are to a collection of documents relating to the property or the terms on which it is or may become available for sale<sup>6</sup>; and references to a 'responsible person', in relation to a residential property, are to any person who is for the time being responsible for marketing the property<sup>7</sup>. A person acting as estate agent<sup>8</sup> becomes responsible for marketing the property when action taken by him or on his behalf puts the property on the market<sup>9</sup> or makes public the fact that the property is on the market<sup>10</sup>. That responsibility ceases when (1) his contract with the seller is terminated (whether by the withdrawal of his instructions or otherwise); (2) he has ceased to take any action which makes public the fact that the property is on the market; and (3) any such action being taken on his behalf has ceased<sup>11</sup>. Any responsibility so arising also ceases when the property is taken off the market or sold<sup>12</sup>. The seller becomes responsible for marketing the property when action taken by him or on his behalf puts the property on the market or makes public the fact that the property is on the market<sup>13</sup>. That responsibility ceases when (a) there is at least one person acting as his estate agent who is responsible for marketing the property; (b) the seller has ceased to take any action which makes public the fact that the property is on the market; and (c) any such action being taken on the seller's behalf has ceased<sup>14</sup>. Any responsibility so arising also ceases when the property is taken off the market or sold<sup>15</sup>.

1 'Residential property' means premises in England and Wales consisting of a single dwelling house, including any ancillary land: Housing Act 2004 s 148(1). 'Dwelling house' means a building or part of a building occupied or intended to be occupied as a separate dwelling (and includes one that is being or is to be constructed) (s 148(1)); and 'ancillary land', in relation to a dwelling house or a sub-divided building, means any land intended to be occupied and enjoyed together with that dwelling house or building: s 177(1).

2 References in *ibid* Pt 5 (ss 148-178) to 'the market' are to the residential property market in England and Wales: s 149(1).

3 *Ie* the duties imposed by *ibid* ss 155-158.

4 *Ibid* s 154(1). Each of those duties is subject to any exception relating to that duty which is provided for in those provisions: s 154(2). The Estate Agents Act 1979 applies in relation to a person who has committed a breach of duty under the 2004 Act Pt 5 in the course of estate agency work as it applies in relation to a person who has engaged in a practice such as is mentioned in the 1979 Act s 3(1)(d) in the course of such work: 2004 Act s 175(3) (see AGENCY (2008) vol 1 PARA 271)

5 *Ie* Housing Act 2004 Pt 5.

6 *Ibid* s 148(2). 'Sale', in relation to a residential property, means a disposal, or agreement to dispose, by way of sale of the freehold interest, the interest under a long lease or an option to acquire the freehold interest or the interest under a long lease: s 177(1). Any reference in the definition of 'sale' to the disposal of an interest of a kind mentioned in the definition includes a reference to the creation of such an interest: s 177(2). 'Long lease' means (1) a lease granted for a term certain exceeding 21 years, irrespective of whether it is (or may become) terminable before the end of that term by notice given by the tenant or by re-entry or forfeiture; or (2) a lease for a term fixed by law under a grant with a covenant or obligation for perpetual renewal, other than a lease by sub-demise from one which is not a long lease; and for this purpose 'lease' does not include a mortgage term: s 177(1).

7 *Ibid* s 151(1).

8 A person acts as estate agent for the seller of a residential property if he does anything, in the course of a business in England and Wales, in pursuance of marketing instructions from the seller: *ibid* s 150(1). For this purpose, 'business in England and Wales' means a business carried on (in whole or in part) from a place in England and Wales; and 'marketing instructions' means instructions to carry out any activities with a view to effecting the introduction to the seller of a person wishing to buy the property or selling the property by auction or tender: s 150(2). It is immaterial for the purposes of s 150 whether a person describes himself as an estate

agent: s 150(3). 'Seller' means a person contemplating disposing of the freehold interest, the interest under a long lease or an option to acquire the freehold interest or the interest under a long lease: s 177(1).

9 A residential property is put on the market when the fact that it is or may become available for sale is, with the intention of marketing the property, first made public in England and Wales by or on behalf of the seller: ibid s 149(2). A fact is made public when it is advertised or otherwise communicated (in whatever form and by whatever means) to the public or to a section of the public: s 149(4).

10 Ibid s 152(1).

11 Ibid s 152(2).

12 Ibid s 152(3).

13 Ibid s 153(1).

14 Ibid s 153(2). In s 153, references to action taken on behalf of the seller exclude action taken by or on behalf of a person acting as his estate agent: s 153(3).

15 Ibid s 153(4).

## 2. Duty to have a home information pack

It is the duty of a responsible person<sup>1</sup> to have in his possession or under his control<sup>2</sup> a home information pack<sup>3</sup> for the property which complies with the requirements of specified regulations<sup>4</sup>. The duty does not apply where the responsible person is the seller<sup>5</sup> at any time when (1) there is another person who is responsible for marketing the property<sup>6</sup>; and (2) the seller believes on reasonable grounds that the other responsible person has a home information pack for the property in his possession or under his control which complies with those requirements<sup>7</sup>.

1 As to responsible persons see PARA 4A.1.

2 A document which is not in electronic form is only to be regarded for the purposes of the Housing Act 2004 Pt 5 (ss 148-178) as being under the control of a person while it is in the possession of another if he has the right to take immediate possession of the document on demand (and without payment): s 177(3). A document held in electronic form is only to be regarded for such purposes as being in a person's possession or under his control if he is readily able (using equipment available to him) to view the document in a form that is visible and legible and to produce copies of it in a visible and legible documentary form: s 177(4).

3 For the meaning of 'home information pack' see PARA 4A.1 TEXT AND NOTE 6.

4 2004 Act s 155(1), referring to regulations under s 163. The duty under s 155 applies subject to the Home Information Pack (No 2) Regulations 2007, SI 2007/1667 (amended by SI 2007/3301, SI 2008/572, SI 2008/898, SI 2008/1266, SI 2008/2363, SI 2008/3107, SI 2009/34) which prescribe the documents to be included in home information packs and the circumstances in which they are included: SI 2007/1667 reg 34 (amended by SI 2007/3301, SI 2008/1266). Where a duty arises under the 2004 Act s 155 or 159 (see PARA 4A.7), every estate agent to whom the duty applies must be a member of an approved redress scheme: Home Information Pack (Redress Scheme) (No 2) Order 2009, SI 2009/1946, reg 2(1). The requirement does not apply to an estate agent who does not engage in estate agency work within the meaning of the Estate Agents Act 1979 s 1: SI 2007/1946 reg 2(2).

5 For the meaning of 'seller' see PARA 4A.1 NOTE 8.

6 Ie under the 2004 Act s 152.

7 Ibid s 155(2).

## 3. Duty to provide copy of home information pack on request

Where a potential buyer<sup>1</sup> makes a request to a responsible person<sup>2</sup> for a copy of the home information pack<sup>3</sup>, or of a document (or part of a document) which is or ought to be included in

that pack, it is the duty of the responsible person to comply with that request within the permitted period<sup>4</sup>. The permitted period is the period of 14 days beginning with the day on which the request is made<sup>5</sup>. The responsible person does not comply with that duty unless (1) he provides the potential buyer with a document which is a copy of the home information pack<sup>6</sup> for the property as it stands at the time when the document is provided, or a copy of a document (or part of a document) which is included in that pack, as the case may be; and (2) that pack or document complies with the requirements of any regulations<sup>7</sup> prescribing the contents of such packs at that time<sup>8</sup>. That duty does not apply if, before the end of the permitted period, the responsible person believes on reasonable grounds that the person making the request (a) is unlikely to have sufficient means to buy the property in question; (b) is not genuinely interested in buying a property of a general description which applies to the property; or (c) is not a person to whom the seller<sup>9</sup> is likely to be prepared to sell the property<sup>10</sup>. The exception does not apply if the responsible person knows or suspects that the person making the request is an officer of an enforcement authority<sup>11</sup>. Nothing in the above provisions authorises the doing of anything which constitutes an unlawful act of discrimination<sup>12</sup>. The duty does not apply also where the responsible person is the seller if, when the request is made, the duty to have a home information pack<sup>13</sup> does not<sup>14</sup> apply to him<sup>15</sup>. But where the duty is excluded for that reason, it is the duty of the seller to take reasonable steps to inform the potential buyer that the request should be made to the other person<sup>16</sup>. The responsible person may charge a sum not exceeding the reasonable cost of making and, if requested, sending a paper copy of the pack or document<sup>17</sup>. If the responsible person ceases to be responsible for marketing the property before the end of the permitted period (whether because the property has been taken off the market<sup>18</sup> or sold or for any other reason), he ceases to be under any duty to comply with the request<sup>19</sup>. A person does not comply with the duty by providing a copy in electronic form unless the potential buyer consents to receiving it in that form<sup>20</sup>.

1 'Potential buyer' means a person who claims that he is or may become interested in buying a residential property: Housing Act 2004 s 177(1). For the meaning of 'residential property' see PARA 4A.1 NOTE 1.

2 As to responsible persons see PARA 4A.1.

3 For the meaning of 'home information pack' see PARA 4A.1 TEXT AND NOTE 6.

4 2004 Act s 156(1). The duty under s 156 applies subject to the Home Information Pack (No 2) Regulations 2007, SI 2007/1667 (see PARA 4A.2): reg 34.

5 2004 Act s 156(9). This is subject to s 157(5): see PARA 4A.4.

6 Ie the home information pack intended by the responsible person to be the one required by *ibid* s 155 (see PARA 4A.2): s 156(3).

7 Ie under *ibid* s 163.

8 *Ibid* s 156(2).

9 For the meaning of 'seller' see PARA 4A.1 NOTE 8.

10 2004 Act s 156(4).

11 *Ibid* s 156(5). As to enforcement authorities see PARA 4A.11.

12 *Ibid* s 156(4).

13 Ie the duty under *ibid* s 155: see PARA 4A.2.

14 Ie by virtue of *ibid* s 155(2).

15 *Ibid* s 156(6).

16 *Ibid* s 156(7).



- 17 Ibid s 156(8).
- 18 For the meaning of 'the market' see PARA 4A.1 NOTE 2.
- 19 2004 Act s 156(10).
- 20 Ibid s 156(11).

#### **4. Imposition of conditions**

A potential buyer<sup>1</sup> who has made a request for a copy of the home information pack<sup>2</sup>, or of a document (or part of a document) which is or ought to be included in that pack<sup>3</sup>, may, before any copy is provided, be required to either pay a charge<sup>4</sup> and/or accept any terms specified in writing which are proposed by the seller<sup>5</sup> or in pursuance of his instructions and relate to the use or disclosure of the copy (or any information contained in or derived from it)<sup>6</sup>. A condition is only effective if it is notified to the potential buyer before the end of the period of 14 days beginning with the day on which the request is made<sup>7</sup>. Where the potential buyer has been so notified of either or both of the conditions so authorised, the permitted period<sup>8</sup> is the period of 14 days beginning with (1) where one condition is involved, the day on which the potential buyer complies with it by making the payment demanded or accepting the terms proposed (or such other terms as may be agreed between the seller and the potential buyer in substitution for those proposed), as the case may be; or (2) where both conditions are involved, the day (or the later of the days) on which the potential buyer complies with them by taking the action mentioned in head (1) above<sup>9</sup>.

- 1 For the meaning of 'potential buyer' see PARA 4A.3 NOTE 1.
- 2 For the meaning of 'home information pack' see PARA 4A.1 TEXT AND NOTE 6.
- 3 Ie a request to which the Housing Act 2004 s 156(1) (see PARA 4A.3 TEXT AND NOTES 1-4) applies.
- 4 Ie one authorised under ibid s 156(8): see PARA 4A.3 TEXT AND NOTE 17.
- 5 For the meaning of 'seller' see PARA 4A.1 NOTE 8.
- 6 2004 Act s 157(1)-(3). The duty under s 157 applies subject to the Home Information Pack (No 2) Regulations 2007, SI 2007/1667 (see PARA 4A.2): reg 34.
- 7 2004 Act s 157(4).
- 8 As to the permitted period see PARA 4A.3 TEXT AND NOTE 5.
- 9 2004 Act s 157(5).

#### **5. Duty to ensure authenticity of documents in other situations**

Where a responsible person<sup>1</sup> provides a potential buyer<sup>2</sup> with, or allows a potential buyer to inspect, any document purporting to be a copy of the home information pack<sup>3</sup> for the property or a copy of a document (or part of a document) included in that pack, the responsible person is under a duty to ensure that the document is authentic<sup>4</sup>. A document is not authentic for these purposes unless, at the time when it is provided or inspected, it is a copy of the home information pack<sup>5</sup> for the property or a document (or part of a document) included in that pack, as the case may be, and that pack or document complies with the requirements of any regulations<sup>6</sup> prescribing the contents of such packs<sup>7</sup>. The duty does not apply to anything provided in pursuance of the duty to provide a copy of a home information pack on request<sup>8</sup>.

- 1 As to responsible persons see PARA 4A.1.

- 2 For the meaning of 'potential buyer' see PARA 4A.3 NOTE 1.
- 3 For the meaning of 'home information pack' see PARA 4A.1 TEXT AND NOTE 6.
- 4 Housing Act 2004 s 158(1). The duty under s 158 applies subject to the Home Information Pack (No 2) Regulations 2007, SI 2007/1667 (see PARA 4A.2): reg 34.
- 5 Ie the home information pack intended by the responsible person to be the one required by the 2004 Act s 155 (see PARA 4A.2): s 158(3).
- 6 Ie under ibid s 163.
- 7 Ibid s 158(2).
- 8 Ie the duty under ibid s 156: s 158(4).

## **6. Other duties of person acting as estate agent**

The following provisions apply to a person acting as estate agent<sup>1</sup> for the seller<sup>2</sup> of a residential property<sup>3</sup> where either the property is not on the market or the property is on the market but the person so acting is not a person responsible<sup>4</sup> for marketing the property<sup>5</sup>. It is the duty of such a person to have in his possession or under his control<sup>6</sup>, when any qualifying action is taken by him or on his behalf, a home information pack<sup>7</sup> for the property which complies with the requirements of any regulations<sup>8</sup> prescribing the contents of such a pack<sup>9</sup>. For this purpose, 'qualifying action' means action taken with the intention of marketing the property which communicates to any person in England and Wales the fact that the property is or may become available for sale, but does not put the property on the market<sup>10</sup> or make public<sup>11</sup> the fact that the property is on the market<sup>12</sup>. Where such a person provides a potential buyer<sup>13</sup> with, or allows a potential buyer to inspect, any document purporting to be a copy of the home information pack for the property or a copy of a document (or part of a document) included in that pack, it is his duty to ensure that it is an authentic copy<sup>14</sup>. A document is not authentic for this purposes unless, at the time when it is provided or inspected, it is a copy of the home information pack<sup>15</sup> for the property or a document (or part of a document) included in that pack, as the case may be, and that pack or document complies with the requirements of any regulations prescribing the contents of such a pack<sup>16</sup>.

- 1 For the meaning of 'acting as estate agent' see PARA 4A.1 NOTE 8.
- 2 For the meaning of 'seller' see PARA 4A.1 NOTE 8.
- 3 For the meaning of 'residential property' see PARAA 4A.1 NOTE 1.
- 4 As to responsible persons see PARAA 4A.1.
- 5 Housing Act 2004 s 159(1). The duty under s 159 applies subject to the Home Information Pack (No 2) Regulations 2007, SI 2007/1667 (see PARA 4A.2): reg 34. See also the Home Information Pack (Redress Scheme) (No 2) Order 2007, SI 2007/1946; and PARA 4A.2.
- 6 As to the control of documents see PARA 4A.2 NOTE 2.
- 7 For the meaning of 'home information pack' see PARA 4A.1 TEXT AND NOTE 6.
- 8 Ie under the 2004 Act s 163.
- 9 Ibid s 159(2).
- 10 As to when a property is put on the market see PARA 4A.1 NOTE 9.
- 11 As to when a fact is 'made public' see PARA 4A.1 NOTE 9.
- 12 2004 Act s 159(3).

13 For the meaning of 'potential buyer' see PARA 4A.3 NOTE 1.

14 2004 Act s 159(4).

15 Ie the home information pack intended by the person to be the one required by ibid s 159(2) : s 159(6).

16 Ibid s 159(5).

## **7. Exceptions to and suspension of duties**

The duties<sup>1</sup> relating to home information packs<sup>2</sup> do not apply in relation to a residential property<sup>3</sup> at any time when it is not available for sale with vacant possession<sup>4</sup>. But a residential property is presumed to be available with vacant possession at any time when any of those duties would apply in relation to the property if it is so available, unless the contrary appears from the manner in which the property is being marketed at that time<sup>5</sup>. The Secretary of State may by regulations provide for other exceptions from any of the duties in such cases and circumstances, and to such extent, as may be specified in the regulations<sup>6</sup>. The Secretary of State may also make an order suspending (or later reviving) the operation of any of the duties<sup>7</sup>. Such an order may provide for the suspension of a duty to take effect only for a period specified in the order<sup>8</sup>. A duty which is (or is to any extent) revived after being so suspended is liable to be suspended again<sup>9</sup>.

1 Ie those under the Housing Act 2004 ss 155-159: see PARAS 4A.2-4A.6.

2 For the meaning of 'home information pack' see PARA 4A.1 TEXT AND NOTE 6.

3 For the meaning of 'residential property' see PARA 4A.1 NOTE 1.

4 2004 Act s 160(1).

5 Ibid s 160(2).

6 Ibid s 161.

7 Ibid s 162(1).

8 Ibid s 162(2).

9 Ibid s 162(3).

## **8. Contents of home information packs**

The Secretary of State may make regulations prescribing (1) the documents which are required or authorised to be included in the home information pack<sup>1</sup> for a residential property<sup>2</sup>; and (2) particular information which is required or authorised to be included in, or which is to be excluded from, any such document<sup>3</sup>. Any such document must be one that the Secretary of State considers would disclose relevant information<sup>4</sup>. For this purpose, 'relevant information' means information about any matter connected with the property (or the sale of the property) that would be of interest to potential buyers<sup>5</sup>. Any particular information required or authorised to be included in a prescribed document must be information that the Secretary of State considers to be relevant information<sup>6</sup>. The information which the Secretary of State may consider to be relevant information includes any information about (a) the interest which is for sale and the terms on which it is proposed to sell it; (b) the title to the property; (c) anything relating to or affecting the property that is contained in a register required to be kept by or under any enactment (whenever passed) or records kept by a person who can reasonably be expected to give information derived from those records to the seller at his request (on payment, if required, of a reasonable charge); (d) the physical condition of the property (including any particular characteristics or features of the property); (e) the energy efficiency of

the property; (f) any warranties or guarantees subsisting in relation to the property; and (g) any taxes, service charges or other charges payable in relation to the property<sup>7</sup>. The regulations may require or authorise the home information pack to include replies the seller proposes to give to prescribed pre-contract inquiries and documents or particular information indexing or otherwise explaining the contents of the pack<sup>8</sup>. The regulations may require a prescribed document to be in such form as may be prescribed and to be prepared by a person of a prescribed description on such terms (if any) as may be prescribed<sup>9</sup>. Such terms may include terms which enable provisions of the contract under which the document is to be prepared to be enforced by a potential or actual buyer, a mortgage lender, or any other person involved in the sale of the property who is not a party to that contract<sup>10</sup>. The regulations may provide for the time at which any document is to be included in or removed from the home information pack, and make different provision for different areas, for different descriptions of properties or for other different circumstances (including the manner in which a residential property is marketed)<sup>11</sup>.

1 For the meaning of 'home information pack' see PARA 4A.1 TEXT AND NOTE 6.

2 For the meaning of 'residential property' see PARA 4A.1 NOTE 1.

3 Housing Act 2004 s 163(1).

4 Ibid s 163(2).

5 Ibid s 163(4). For the meaning of 'potential buyer' see PARA 4A.3 NOTE 1.

6 Ibid s 163(3).

7 Ibid s 163(5).

8 Ibid s 163(6).

9 Ibid s 163(7).

10 Ibid s 163(8).

11 Ibid s 163(9).

## **9. Home condition reports**

Regulations<sup>1</sup> prescribing the contents of home information packs<sup>2</sup> may make provision in relation to any description of document dealing with the physical condition of the property (including any particular characteristics or features of the property) or the energy efficiency of the property which is to be included in the home information pack<sup>3</sup>; such a document is to be known as a 'home condition report'<sup>4</sup>. The regulations may require a home condition report to be made by an individual who is a member of an approved certification scheme following an inspection carried out by him in accordance with the provisions of the scheme<sup>5</sup>. The regulations must, if such provision<sup>6</sup> is made, make provision for the approval by the Secretary of State of one or more suitable certification schemes (and for the withdrawal by him of any such approval)<sup>7</sup>. The regulations must require the Secretary of State to be satisfied, before approving a certification scheme, that the scheme contains appropriate provision (1) for ensuring that members of the scheme are fit and proper persons who are qualified (by their education, training and experience) to produce home condition reports; (2) for ensuring that members of the scheme have in force suitable indemnity insurance; (3) for facilitating the resolution of complaints against members of the scheme; (4) for requiring home condition reports made by members of the scheme to be entered on the register of home condition reports<sup>8</sup>; (5) for the keeping of a public register of the members of the scheme; and (6) for such other purposes as may be specified in the regulations<sup>9</sup>. Head (4) above applies only where provision for a register of home condition reports is made<sup>10</sup>. The regulations may require or

authorise an approved certification scheme to contain provision about any matter relating to the home condition reports with which the scheme is concerned (including the terms on which members of the scheme may undertake to produce a home condition report)<sup>11</sup>.

1    Ie under the Housing Act 2004 s 163: see PARA 4A.8.

2    For the meaning of 'home information pack' see PARA 4A.1 TEXT AND NOTE 6.

3    2004 Act s 164(1).

4    Ibid s 164(2).

5    Ibid s 164(3).

6    Ie under ibid s 164(3).

7    Ibid s 164(4).

8    Ie under ibid s 165: see PARA 4A.10.

9    Ibid s 164(5).

10   Ibid s 164(6).

11   Ibid s 164(7).

## **10. Register of home condition reports**

Where provision<sup>1</sup> is made in relation to the making of a home condition report<sup>2</sup> by a member of an approved certification scheme, regulations<sup>3</sup> may make provision for and in connection with a register of the home condition reports made by members of the scheme<sup>4</sup>. The regulations may provide for the register to be kept by (or on behalf of) the Secretary of State or by such other person as the regulations may specify<sup>5</sup>. The regulations may require a person wishing to enter a home condition report onto the register to pay such fee as may be prescribed<sup>6</sup>. No person may disclose the register or any document (or part of a document) contained in it or any information contained in, or derived from, the register except in accordance with any provision of the regulations which authorises or requires such a disclosure to be made<sup>7</sup>. The provision which may be made includes provision as to circumstances in which or purposes for which a person or a person of a prescribed description may (1) on payment of such fee, if any, as may be prescribed (a) inspect the register or any document (or part of a document) contained in it; (b) take or be given copies of the register or any document (or part of a document) contained in it; or (c) be given information contained in, or derived from, the register; or (2) disclose anything obtained by virtue of provision made under head (1) above<sup>8</sup>. The purposes which may be so prescribed may be public purposes or purposes of private undertakings or other persons<sup>9</sup>. A person who contravenes the prohibition on disclosure is guilty of an offence and is liable on summary conviction to a fine not exceeding level 5 on the standard scale<sup>10</sup>.

1    Ie under the Housing Act 2004 s 164(3): see PARA 4A.9 TEXT AND NOTE 5.

2    As to home condition reports see PARA 4A.9.

3    Ie under the 2004 Act s 163: see PARA 4A.8.

4    Ibid s 165(1). Nothing in s 165 limits the power to make regulations under s 163: s 165(8).

5    Ibid s 165(2).

6    Ibid s 165(3).

7 Ibid s 165(4).

8 Ibid s 165(5).

9 Ibid s 165(6).

10 Ibid s 165(7). As to 'standard scale' see SENTENCING AND DISPOSITION OF OFFENDERS vol 92 (2010) PARA 142.

## **11. Enforcement authorities**

Every local weights and measures authority is an enforcement authority for the purposes of the provisions relating to home information packs<sup>1</sup>. It is the duty of each enforcement authority to enforce specified duties<sup>2</sup> relating to home information packs in its area<sup>3</sup>.

1 Housing Act 2004 s 166(1). For the meaning of 'home information pack' see PARA 4A.1 TEXT AND NOTE 6.

2 Ie those under ibid ss 155-159 and 167(4).

3 Ibid s 166(2) (amended by Consumers, Estate Agents and Redress Act 2007 Sch 7 para 23(2)).

## **12. Power to require production of home information packs**

An authorised officer of an enforcement authority<sup>1</sup> may require a person who appears to him to be or to have been subject to the duty<sup>2</sup>, in relation to a residential property<sup>3</sup>, to produce for inspection a copy of, or of any document included in, the home information pack<sup>4</sup> for that property<sup>5</sup>. The power so conferred includes power to require the production in a visible and legible documentary form of any document included in the home information pack in question which is held in electronic form, and to take copies of any document produced for inspection<sup>6</sup>. Such a requirement may not be imposed more than six months after the last day on which the person concerned was subject to the relevant duty in relation to the property<sup>7</sup>. It is the duty of a person subject to such a requirement to comply with it within the period of seven days beginning with the day after that on which it is imposed<sup>8</sup>, although a person is not required to comply with such a requirement if he has a reasonable excuse for not complying<sup>9</sup>.

1 As to enforcement authorities see PARA 4A.11.

2 Ie under the Housing Act 2004 s 155 or 159(2).

3 For the meaning of 'residential property' see PARA 4A.1 NOTE 1.

4 In the 2004 Act s 167, 'home information pack' means (1) where a requirement under s 167 is imposed on a person at a time when he is subject to the duty under s 155 or 159(2), the home information pack intended by him to be the one he is required to have at that time; or (2) in any other case, the home information pack intended by the person concerned, when he was last subject to the duty under s 155 or 159(2), to be the one he was required to have at that time: s 167(6). For the general meaning of 'home information pack' see PARA 4A.1 TEXT AND NOTE 6.

5 Ibid s 167(1).

6 Ibid s 167(2).

7 Ibid s 167(3).

8 Ibid s 167(4).

9 Ibid s 167(5).

## **13. Penalty charge notices**

An authorised officer of an enforcement authority<sup>1</sup> may, if he believes that a person has committed a breach of a specified duty<sup>2</sup> in relation to home information packs<sup>3</sup> give a penalty charge notice to that person<sup>4</sup>. A penalty charge notice may not be given after the end of the period of six months beginning with the day (or in the case of a continuing breach the last day) on which the breach of duty was committed<sup>5</sup>. Supplementary provision about penalty charge notices is made<sup>6</sup>.

1 As to enforcement authorities see PARA 4A.11.

2 Ie one under the Housing Act 2004 ss 155-159 and 167(4).

3 For the meaning of 'home information pack' see PARA 4A.1 TEXT AND NOTE 6.

4 2004 Act s 168(1) (amended by Consumers, Estate Agents and Redress Act 2007 Sch 7 para 23(3)).

5 2004 Act s 168(2).

6 See *ibid* Sch 8.

#### **14. Offences relating to enforcement officers**

A person who obstructs an officer of an enforcement authority<sup>1</sup> acting in pursuance of his power<sup>2</sup> to request a document contained in a home information pack<sup>3</sup> is guilty of an offence<sup>4</sup>. A person who, not being an authorised officer of an enforcement authority, purports to act as such is guilty of an offence<sup>5</sup>. A person guilty of either of the above offences is liable on summary conviction to a fine not exceeding level 5 on the standard scale<sup>6</sup>.

1 As to enforcement authorities see PARA 4A.11.

2 Ie under the Housing Act 2004 s 167: see PARA 4A.12.

3 For the meaning of 'home information pack' see PARA 4A.1 TEXT AND NOTE 6.

4 2004 Act s 169(1).

5 *Ibid* s 169(2).

6 *Ibid* s 169(3). See also PARA 4A.10 NOTE 10

#### **15. Right of private action**

The following provisions apply where a person ('the responsible person') has committed a breach of duty<sup>1</sup> by failing to comply with a request from a potential buyer<sup>2</sup> of a residential property<sup>3</sup> for a copy of a prescribed document<sup>4</sup>. If the potential buyer commissions his own version of the prescribed document at a time when two specified conditions are satisfied, he is entitled to recover from the responsible person any reasonable fee paid by him in order to obtain the document<sup>5</sup>. The conditions are (1) the property is on the market or the potential buyer and the seller<sup>6</sup> are attempting to reach an agreement for the sale of the property<sup>7</sup>; and (2) the potential buyer has not been provided with an authentic copy of the prescribed document<sup>8</sup>. A copy of a prescribed document is not authentic for this purpose unless (a) it is a copy of a document included in the home information pack<sup>9</sup> for the property as it stands at the time the copy is provided to the potential buyer; and (b) the document so included complies with the requirements of any regulations<sup>10</sup> relating to the contents of home information packs at that time<sup>11</sup>. It is immaterial for the purposes of the above provisions that the request in question did not specify the prescribed document but was for a copy of the home information pack or a part of the pack which included (or ought to have included) that document<sup>12</sup>.

- 1    le under the Housing Act 2004 s 156: see PARA 4A.3.
- 2    For the meaning of 'potential buyer' see PARA 4A.3 NOTE 1.
- 3    For the meaning of 'residential property' see PARA 4A.1 NOTE 1.
- 4    2004 Act s 170(1). In s 170 'prescribed document' means a document (being one required to be included in the home information pack by regulations under s 163) which is prescribed by regulations made by the Secretary of State for the purposes of s 170: s 170(7). For the meaning of 'home information pack' see PARA 4A.1 TEXT AND NOTE 6.
- 5    Ibid s 170(2).
- 6    For the meaning of 'seller' see PARA 4A.1 NOTE 8.
- 7    2004 Act s 170(3).
- 8    Ibid s 170(4).
- 9    le the home information pack intended by the responsible person to be the one required by ibid s 155 (see PARA 4A.2): s 170(6).
- 10   le under ibid s 163: see PARA 4A.8.
- 11   Ibid s 170(5).
- 12   Ibid s 170(8).

## **16. Sub-divided buildings**

The following provisions apply where (1) two or more dwelling houses<sup>1</sup> in a sub-divided building are marketed for sale (with any ancillary land<sup>2</sup>) as a single property; and (2) any one or more of those dwelling houses is not available for sale (with any ancillary land) as a separate residential property<sup>3</sup> but is available with vacant possession<sup>4</sup>. For these purposes, 'sub-divided building' means a building or part of a building originally constructed or adapted for use as a single dwelling which has been divided (on one or more occasions) into separate dwelling houses<sup>5</sup>. The rules relating to home information packs<sup>6</sup> apply to such dwelling houses (with any ancillary land) as if they were a residential property<sup>7</sup>. This does not affect the application of the rules relating to home information packs to any of those dwelling houses which is available for sale (with any ancillary land) as a separate residential property<sup>8</sup>.

- 1    For the meaning of 'dwelling house' see PARA 4A.1 NOTE 1.
- 2    For the meaning of 'ancillary land' see PARA 4A.1 NOTE 1.
- 3    For the meaning of 'residential property' see PARA 4A.1 NOTE 1.
- 4    Housing Act 2004 s 171(1).
- 5    Ibid s 171(4).
- 6    le ibid Pt 5 (ss 148-178).
- 7    Ibid s 171(2)(a). Section 160 (see PARA 4A.7) does not apply in such cases: s 171(2)(b).
- 8    Ibid s 171(3).

## **17. Office of Fair Trading**

An enforcement authority<sup>1</sup> may notify the Office of Fair Trading of any breach of duty<sup>2</sup> appearing to the authority to have been committed by a person acting as estate agent<sup>3</sup>. An



enforcement authority must also notify the Office of Fair Trading of (1) any penalty charge notice given by an officer of the authority<sup>4</sup>; (2) any notice given by the authority confirming or withdrawing a penalty charge notice; and (3) the result of any appeal from the confirmation of a penalty charge notice<sup>5</sup>.

- 1 As to enforcement authorities see PARA 4A.11.
- 2 Ie under the Housing Act 2004 Pt 5 (ss 148-178).
- 3 Ibid s 175(1). For the meaning of 'acting as estate agent' see PARA 4A.1 NOTE 8.
- 4 Ie under ibid s 168: see PARA 4A.13.
- 5 Ibid s 175(2).

## **18. Grants**

The Secretary of State may make grants towards expenditure incurred by any person in connection with (1) the development of proposals for any provision to be made by regulations<sup>1</sup> prescribing the contents of home information packs<sup>2</sup>; (2) the development of schemes which are intended to be certification schemes for the purposes of any provision made or expected to be made in such regulations<sup>3</sup>; or (3) the development of a register for the purposes of any provision made or expected to be made in such regulations<sup>4</sup>. Such a grant may be made on conditions, which may include (among other things), conditions as to the purposes for which the grant or any part of it may be used and conditions requiring the repayment of the grant or any part of it in such circumstances as may be specified in the conditions<sup>5</sup>.

- 1 Ie under the Housing Act 2004 s 163: see PARA 4A.8.
- 2 For the meaning of 'home information pack' see PARA 4A.1 TEXT AND NOTE 6.
- 3 Ie by virtue of ibid s 164: see PARA 4A.9.
- 4 Ibid s 176(1), referring to regulations by virtue of s 165 (see PARA 4A.10).
- 5 Ibid s 176(2).

## **UPDATE**

### **1-136 The Contract and Preliminary Matters**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(2) INQUIRIES AND SEARCHES BEFORE CONTRACT/(i) Inquiries and Inspection/A. IN GENERAL/5. Inquiries of vendor and local authorities.

## **5. Inquiries of vendor and local authorities.**

Preliminary inquiries are usually made in the first place of the vendor and in the second place of the local authorities<sup>1</sup>. Sets of inquiries relating to matters with which local authorities are concerned have been agreed between the associations representing those authorities and The Law Society and local authorities are prepared to answer those inquiries on payment of a small fee<sup>2</sup>.

It seems that the answers to preliminary inquiries do not, in any case, amount to a warranty that the matters stated in them are true, so as to give rise to an action for breach of warranty after completion<sup>3</sup>. The answers, however, constitute representations, and, if they are material and incorrect and made by the vendor or his agent, they may entitle the purchaser to rescind the contract<sup>4</sup>. Alternatively, the purchaser will be entitled to damages unless the maker of the misrepresentation proves that, on reasonable grounds, he believed in the truth of the facts represented up to the time when the contract was made<sup>5</sup>.

1 As to inquiries of tenants see PARA 6 post; and as to particular subjects of inquiry see PARAS 8-18 post.

2 The inquiries are addressed to the appropriate district or London borough council, which then obtains information as necessary from the appropriate county council. In practice these inquiries are usually sent with the application for an official search of the local land charges register: see PARA 20 post. As to fees see the Local Authorities (Charges for Land Searches) Regulations 1994, SI 1994/1885 (amended by SI 1996/525).

3 *Gilchester Properties Ltd v Gomm* [1948] 1 All ER 493; *Mahon v Ainscough* [1952] 1 All ER 337, CA.

4 See PARA 42 post. As to the court's discretionary power to order damages in lieu of rescission where the misrepresentation is proved by its maker to be purely innocent see PARA 42 post.

5 See the Misrepresentation Act 1967 s 2(1); para 42 post; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 801. As to statutory regulation of attempts to exclude or restrict liability for misrepresentation see PARA 116 post; and *Walker v Boyle* [1982] 1 All ER 634, [1982] 1 WLR 495. The vendor is not protected by a statement that the replies to preliminary inquiries are believed to be correct but that their accuracy is not guaranteed, and that they do not obviate the need to make appropriate searches, inquiries and inspections (see the Standard Conditions of Sale (3rd Edn), conditions 3, 4; and PARA 116 post): *Walker v Boyle* supra. As to the Standard Conditions of Sale see PARA 1 note 9 ante.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### 5 Inquiries of vendor and local authorities

NOTE 2--SI 1994/1885 replaced, in relation to England, by the Local Authorities (England) (Charges for Property Searches) Regulations 2008, SI 2008/3248, and in relation to Wales, by the Local Authorities (Charges for Property Searches) (Wales) Regulations 2009, SI 2009/369.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(2) INQUIRIES AND SEARCHES BEFORE CONTRACT/(i) Inquiries and Inspection/A. IN GENERAL/6. Inspection of property and inquiries of tenants.

### 6. Inspection of property and inquiries of tenants.

Before entering into a formal contract, the purchaser must make an inspection of the property, since he is deemed to buy with notice of patent defects of title<sup>1</sup>. However, the constructive notice which arises from the occupation of land by someone other than the vendor<sup>2</sup> is not in itself sufficient to make the defect patent<sup>3</sup>. Where it appears that the property is subject to a lease or tenancy<sup>4</sup>, inquiry should be made of the tenants, as well as the landlord, seeking to ascertain whether the tenants have statutory security of tenure and whether the rents are subject to statutory control<sup>5</sup>.

1 As to patent defects see PARA 45 post; and as to the advisability of a survey see PARA 7 post.

2 See *Hunt v Luck* [1902] 1 Ch 428 at 433, CA; *Caunce v Caunce* [1969] 1 All ER 722, [1969] 1 WLR 286; *Williams and Glyn's Bank Ltd v Boland* [1981] AC 487, [1980] 2 All ER 408, HL; and *Kingsnorth Trust Ltd v Tizard* [1986] 2 All ER 54, sub nom *Kingsnorth Finance Co Ltd v Tizard* [1986] 1 WLR 783. A purchaser of unregistered land need not inquire whether a tenant has a right to rectification of the lease: *Smith v Jones* [1954] 2 All ER 823, [1954] 1 WLR 1089. As to registered land see *Blacklocks v JB Developments (Godalming) Ltd* [1982] Ch 183, [1981] 3 All ER 392. See further PARA 329 post.

3 See *Yandle & Sons v Sutton* [1922] 2 Ch 199; and PARA 45 post. As to constructive notice in relation to dealings with land and statutory restrictions on constructive notice see EQUITY vol 16(2) (Reissue) PARAS 581, 583; as to inquiries with regard to tenancies see PARAS 8-9 post; and as to the vendor's duty to disclose existing tenancies see PARA 58 post. The court will not grant an immediate decree of specific performance against a purchaser while there remain outstanding differences between the vendor and his tenant: *George v Thomas* (1904) 90 LT 505.

4 As to the general law of leases and tenancies see LANDLORD AND TENANT. Consider also the Leasehold Reform Act 1967 (see LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1389 et seq). Where a tenant has statutory security of tenure, an agreement by the tenant to surrender possession on completion will not terminate the statutory right to security: *Appleton v Aspin* [1988] 1 All ER 904, [1988] 1 WLR 410, CA; and see *Woolwich Building Society v Dickman* [1996] 3 All ER 204, 72 P & CR 470, CA.

5 See *Goody v Baring* [1956] 2 All ER 11, [1956] 1 WLR 448 (action by a purchaser against a solicitor for failure to make proper inquiries). The intending purchaser should ask the tenant to produce the rent book: see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 253-256. He should also inspect the register of rents kept by the rent officer under the Rent Act 1977 s 66, or the register kept by the president of every rent assessment panel under s 79 (as amended): see LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARAS 914, 996. As to inquiries of the vendor as regards the application of the Rent Act 1977 and analogous legislation see PARA 8 post; and LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 808 et seq. As to inquiries of vendor and local authorities see PARA 5 ante.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(2) INQUIRIES AND SEARCHES BEFORE CONTRACT/(i) Inquiries and Inspection/A. IN GENERAL/7. Survey.

## 7. Survey.

Since a purchaser cannot, in general, escape from being affected with notice of any patent defect in the property merely by pleading his own lack of the knowledge necessary to enable him to make a proper inspection<sup>1</sup>, it is in general advisable for him to have the property surveyed by a qualified surveyor<sup>2</sup>. Where a valuation report is prepared by a valuer for a mortgagee, the valuer also owes a duty of care to the purchaser<sup>3</sup>.

1 *Haywood v Cope* (1858) 25 Beav 140 at 148. See also PARA 45 note 5 post.

2 As to contracts subject to survey see PARA 26 post.

3 *Yianni v Edwin Evans & Sons* [1982] QB 438, [1981] 3 All ER 592; *Smith v Eric S Bush (a firm)* [1990] 1 AC 831, [1989] 2 All ER 514, HL; and see BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 300.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(2) INQUIRIES AND SEARCHES BEFORE CONTRACT/(i) Inquiries and Inspection/B. PARTICULAR SUBJECTS OF INQUIRY/8. Leaseholds and tenanted property.

## **B. PARTICULAR SUBJECTS OF INQUIRY**

### **8. Leaseholds and tenanted property.**

Where the property to be purchased is leasehold it is important that the purchaser should inspect the lease for the purpose of ascertaining the exact nature of the covenants and conditions contained in it, since those covenants, in so far as they run with the term, will be binding on him on the assignment of the lease<sup>1</sup>. If he has had a reasonable opportunity of inspecting the lease before contract, he will be bound to complete after signing the contract even though the lease contains onerous covenants<sup>2</sup>. Inquiry should also be made of the vendor whether any necessary licence of the landlord or any superior lessor has been or will be obtained<sup>3</sup>, whether all rent accrued due has been duly paid<sup>4</sup>, whether any breaches of covenant are known to the assignor and whether any notices<sup>5</sup> have been served in respect of such breaches<sup>6</sup>.

Where the land sold is subject to a subsisting tenancy, the vendor should be asked to supply particulars of the tenancy and a copy of any lease or written tenancy agreement under which the tenant holds<sup>7</sup>. Such inquiries should be made as to the nature of the property, and the tenancy, so far as its nature can be ascertained, with a view to determining the applicability of various forms of statutory control, for example the legislation relating to protected tenancies of dwelling houses<sup>8</sup>, to restricted contracts<sup>9</sup>, to assured tenancies<sup>10</sup>, to the protection of tenants holding under long tenancies<sup>11</sup> and to compensation for improvements and security of tenure in the case of business premises<sup>12</sup>. Inquiries should also be made as to the application or the possible future application of the statutory right of certain tenants, where the tenancy is a long tenancy at a low rent, to acquire the freehold or an extended lease<sup>13</sup>. It will be necessary also to inspect, as appropriate, the register of rents kept by the rent officer in respect of protected

tenancies<sup>14</sup> or to the register of rents kept by the president of every rent assessment panel in respect of restricted contracts<sup>15</sup>.

The necessity for making inquiries of tenants, as well as of landlords, as to their rights, including their rights under protective legislation, has already been mentioned<sup>16</sup>.

1 See LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 554 et seq. As to the transmission of the benefit and burden of covenants in leases beginning on or after 1 January 1996 see the Landlord and Tenant (Covenants) Act 1995; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 578-593.

2 See PARA 60 post. As to the vendor's duty to reveal whether he holds the property by lease or underlease see PARA 59 post.

3 As to the vendor's duty to obtain such a licence see PARA 25 post.

4 It is usual to ask to see the last receipt. As to the production of a receipt for rent as evidence of the performance of covenants at the time of completion see PARA 98 post.

5 The notices under the Law of Property Act 1925 s 146: see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 619. As to the necessity for the service of such a notice and default under it before the enforcement of a forfeiture for breach of covenant, and as to the tenant's right to apply to the court for relief see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 619 et seq.

6 As to conditions on the sale of leaseholds out of repair see PARA 99 post.

7 Such inquiries are necessary because, in general, the fact of occupation is notice of a tenant's rights: see PARA 329 post. As to the necessity of inspection of the property by the purchaser and inquiries of the tenant see PARA 6 ante; and as to inquiries in relation to agricultural holdings see PARA 9 post.

8 See LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 808 et seq. Cf *Goody v Baring* [1956] 2 All ER 11, [1956] 1 WLR 448, where the purchaser's solicitor was negligent in accepting information supplied by the vendor as to rents actually being paid without ascertaining standard and recoverable rents. It seems that the rights of tenants under the Rent Act 1977 and similar legislation are incidents of tenure which need not be disclosed by the vendor in the absence of inquiry: see PARA 61 text and notes 1-2 post.

9 See LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 985 et seq.

10 See LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 1011 et seq.

11 See LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARAS 1196 et seq, 1209 et seq.

12 See LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 701 et seq.

13 See LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1389 et seq.

14 See LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 914.

15 See LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 996.

16 See PARA 6 ante.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(2) INQUIRIES AND SEARCHES BEFORE CONTRACT/(i) Inquiries and Inspection/B. PARTICULAR SUBJECTS OF INQUIRY/9. Agricultural holdings and land used for growing timber.

## **9. Agricultural holdings and land used for growing timber.**

Where land is let as an agricultural holding<sup>1</sup>, statutory provisions apply entitling the landlord or tenant to have the rent determined by arbitration<sup>2</sup>, and restrictions are placed on the issue by the landlord of a notice to quit<sup>3</sup>. Further, the tenant, on the termination of the tenancy, has certain rights to compensation<sup>4</sup> of which a purchaser of the land may be deemed to have notice<sup>5</sup>, and the landlord may be liable to provide the tenant with fixed equipment necessary to comply with statutory requirements<sup>6</sup>.

It is consequently necessary for the purchaser of land which is or may be agricultural land in the occupation of a tenant to inquire whether the land constitutes or comprises any agricultural holding, whether any notice to quit has been served, whether the tenant has any prospective claims for compensation, and whether any direction has been made for the provision by the landlord of fixed equipment<sup>7</sup>.

Where land is used for the growing of timber, inquiry should be made whether it is the subject of any forestry dedication covenant, since such a covenant is deemed to have been made on behalf of the covenantor and his successors in title and is enforceable by the Forestry Commissioners against the covenantor's successors in title as if the commissioners had adjacent land benefited by the covenant<sup>8</sup>.

Searches for the existence of agricultural charges are mentioned later in this title<sup>9</sup>.

1 For the meaning of 'agricultural holding' see AGRICULTURAL LAND vol 1 (2008) PARA 323.

2 See AGRICULTURAL LAND vol 1 (2008) PARAS 338-340.

3 See AGRICULTURAL LAND vol 1 (2008) PARAS 373-399.

4 See AGRICULTURAL LAND vol 1 (2008) PARA 418 et seq.

5 See PARA 58 text and note 7 post; and AGRICULTURAL LAND vol 1 (2008) PARA 366. As to conditions with regard to the payment of the outgoing tenant's valuation see PARA 89 post.

6 See AGRICULTURAL LAND vol 1 (2008) PARA 337 et seq.

7 See generally AGRICULTURAL LAND.

8 See FORESTRY vol 52 (2009) PARAS 116-119. Such a covenant is registrable as a Class D land charge: see FORESTRY vol 52 (2009) PARA 117; LAND CHARGES vol 26 (2004 Reissue) PARAS 622-623, 633. As to searches for land charges see PARA 167 post.

9 See PARA 22 post.

## **UPDATE**

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## **10. Restrictive covenants.**

Subject to the statutory provisions which render restrictive covenants entered into after 1925 (unless made between lessor and lessee) void against a purchaser unless registered as land charges<sup>1</sup>, a restrictive covenant binds in equity the successors in title of the covenantor who purchases the land affected with notice of the covenant<sup>2</sup>. The vendor should therefore be asked whether all covenants and conditions restricting the user of the land have been observed and, if they have not, to specify any breaches of which he is aware<sup>3</sup>.

1 See EQUITY vol 16(2) (Reissue) PARA 620; LAND CHARGES vol 26 (2004 Reissue) PARA 635. In the case of registered land, notice of a restrictive covenant may be entered on the register, and such a notice takes the place of registration as a land charge: see LAND REGISTRATION vol 26 (2004 Reissue) PARA 807.

2 See EQUITY vol 16(2) (Reissue) PARA 616 et seq. Registration of a covenant as a land charge constitutes notice: see the Law of Property Act 1925 s 198(1) (as amended); and EQUITY vol 16(2) (Reissue) PARA 577; LAND CHARGES vol 26 (2004 Reissue) PARA 616. As to the effect of entry of a notice of a restrictive covenant in the case of registered land see LAND REGISTRATION vol 26 (2004 Reissue) PARA 995 et seq. As to the effect of the Law of Property Act 1969 s 24 see PARA 54 post; and EQUITY vol 16(2) (Reissue) PARA 577. As to the availability of compensation to a purchaser affected by a charge which he was unable to discover because it was registered against the name of an estate owner who was not a party to any transaction, or concerned in any event, comprised in the relevant title see the Law of Property Act 1969 s 25 (as amended); and LAND CHARGES vol 26 (2004 Reissue) PARA 617.

3 As to the existence of restrictive covenants as a defect in title see PARA 57 post.

## **UPDATE**

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## **11. Restrictions under planning legislation.**

The most important legislation affecting the use of land is the town and country planning legislation, under which the permission of a local planning authority is in general required for the development of land<sup>1</sup>. Compliance with planning control may be compelled by means of an enforcement notice<sup>2</sup>, although in certain circumstances a landowner may be entitled to recover compensation for the refusal or the revocation or modification of planning permission<sup>3</sup>, or to require a local authority to purchase his land after the refusal of permission to develop on the ground that it is incapable of reasonably beneficial use in its existing state<sup>4</sup>. Where the land

proposed to be purchased is, for example, a dwelling house which does not appear to have been substantially modified since its erection, it may be necessary for a purchaser to inquire only as to the position under any development plan affecting the property<sup>5</sup>.

In other cases, however, it may be necessary to ascertain certain matters by inquiries of the vendor<sup>6</sup> and of the appropriate local authority<sup>7</sup>, for example: (1) what is the present user of the property<sup>8</sup>; (2) whether any development has taken place since that date; (3) whether any applications for permission to develop have been made and with what results<sup>9</sup>; (4) whether any permission granted was limited as to time or has since been revoked<sup>10</sup>; (5) whether any directions restricting permitted development are in force in the relevant area<sup>11</sup>; (6) whether an established use certificate has been granted<sup>12</sup>; (7) whether any claims have been made for compensation for loss of development value<sup>13</sup>; (8) whether any claim has been made for compensation for refusal of permission to develop or revocation or modification of permission<sup>14</sup>; (9) whether any notice requiring the local authority to purchase the land has been served and with what result<sup>15</sup>; (10) whether any agreement respecting development has been made with the local planning authority<sup>16</sup>; and (11) whether there is anything on the land which is subject to the special statutory provisions relating to amenities, trees and woodlands, buildings of special architectural or historic interest, industrial or office development, advertisements or waste land<sup>17</sup>.

Search must also be made in the registers kept by local planning authorities of applications for development, enforcement notices and stop notices, if inquiry of the appropriate authority reveals that there is a relevant entry<sup>18</sup>, and in the part of the local land charges register relating to planning charges<sup>19</sup>.

1 See the Town and Country Planning Act 1990 ss 57, 58; and TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARAS 236-237. Permission can be granted to an intending purchaser even before he enters into the contract of purchase: *Hanily v Minister of Local Government and Planning* [1952] 2 QB 444, [1952] 1 All ER 1293. As to contracts conditional upon planning permission see PARA 26 post; and as to the certificate which must accompany an application by an intending purchaser see the Town and Country Planning (General Development Procedure) Order 1995, SI 1995/419, art 7; and TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 470. As to the effect of a factually erroneous certificate on the validity of a subsequent grant of planning permission in respect of the planning application see *Main v Swansea City Council* (1984) 49 P & CR 26, [1985] JPL 558, CA.

2 See the Town and Country Planning Act 1990 ss 172-182 (as amended); and TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARAS 561-572. As to the time limits for breaches of planning control see s 171B (as added); and TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARA 552. As to stop notices see ss 183-187 (as amended); and TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARAS 577-582. As to the power to order discontinuance of the use or alteration or the removal of a building or works see s 102 (as amended); and TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARAS 546-547.

3 See *ibid* Pt IV (ss 107-118) (as amended); and TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARA 914 et seq. Notices as to apportionment of compensation must be deposited with certain local authorities and are also registrable as local land charges: see s 110 (as amended); the Local Land Charges Rules 1977, SI 1977/985, r 3; and LAND CHARGES vol 26 (2004 Reissue) PARA 675.

4 See the Town and Country Planning Act 1990 Pt VI Ch I (ss 137-148) (as amended); and TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARA 966 et seq. As to other cases where the owner may compel purchase see Pt VI Ch II (ss 149-171) (as amended); and TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARA 987 et seq. As to the right to require the purchase of land where its value for sale has been adversely affected by planning proposals see PARA 15 post.

5 See *ibid* Pt II (ss 10-54A) (as amended); and TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 149 et seq. In *Lake v Bushby* [1949] 2 All ER 964 a solicitor was held to be negligent in failing to communicate to his client (the purchaser) his discovery that plans for a building had not been approved.

6 As to inquiries of vendor see PARA 5 ante.

7 This will be the local planning authority: see the Town and Country Planning Act 1990 Pt I (ss 1-9) (as amended); and TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 28 et seq. Answers to inquiries given by an unidentified officer of the local authority over the telephone cannot be relied upon in a subsequent action in



negligence for failure to disclose a planning blight: *JGF Properties Ltd v Lambeth London Borough Council* [1986] 1 EGLR 179, [1986] JPL 839.

8 As to the time limits for breaches of planning control see the Town and Country Planning Act 1990 s 171B (as added); and TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARA 552. As to the continuance in force of certain schemes and agreements made under earlier planning legislation see the Planning (Consequential Provisions) Act 1990 s 5, Sch 3 (as amended); and see generally TOWN AND COUNTRY PLANNING.

9 As to the power of an intending purchaser to apply for permission see note 1 supra; as to conditions providing for rescission if the permitted user differs from that stated in the contract see PARA 80 post; and as to contracts conditional upon obtaining permission see PARA 26 post.

10 As to the duration of planning permission see the Town and Country Planning Act 1990 ss 91-96 (as amended); and TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARAS 519, 537-540. As to revocation or modification see ss 97-100 (as amended); and TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARAS 541-544. As to time limits annexed as a condition on the grant of outline permission see *Kent County Council v Kingsway Investments (Kent) Ltd* [1971] AC 72, [1970] 1 All ER 70, HL; *Cardiff Corp v Secretary of State for Wales* (1971) 22 P & CR 718; and TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 519.

11 See the Town and Country Planning (General Development Procedure) Order 1995, SI 1995/418, art 4 (as amended), art 5; and TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARAS 450, 521.

12 See the Town and Country Planning Act 1990 ss 191-196 (as amended); and TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARAS 586-595.

13 See notes 3-4 supra.

14 See note 3 supra.

15 See note 4 supra.

16 See the Town and Country Planning Act 1990 s 106 (as substituted); and TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARAS 244-245, 251.

17 See *ibid* Pt VIII (ss 197-225) (as amended); the Planning (Listed Buildings and Conservation Areas) Act 1990; and TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARAS 769 et seq, 847 et seq; TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1072 et seq. As to the control of advertisements see PARA 14 post; and as to the control of pollution and waste see the Environmental Protection Act 1990 Pt I (ss 1-28) (as amended), Pt II (ss 29-78); and see generally ENVIRONMENTAL QUALITY AND PUBLIC HEALTH. As to the registration of planning matters as local land charges see LAND CHARGES vol 26 (2004 Reissue) PARA 678; and as to the registration of lists of buildings of special architectural or historic interest see LAND CHARGES vol 26 (2004 Reissue) PARA 685.

18 See the Town and Country Planning Act 1990 s 69 (as amended), s 188 (as amended); and TOWN AND COUNTRY PLANNING vol 46(1) (Reissue) PARA 466; TOWN AND COUNTRY PLANNING vol 46(3) PARA 1275. Enforcement notices and stop notices seem also to be registrable as local land charges. As to special controls relating to caravan sites see the Caravan Sites and Control of Development Act 1960; the Caravan Sites Act 1968; and TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1032 et seq; and as to the protection of residential occupiers of caravans see the Mobile Homes Act 1975; the Mobile Homes Act 1983; and LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARAS 1267-1284.

19 See LAND CHARGES vol 26 (2004 Reissue) PARAS 678 (planning charges), 685 (listed building charges). As to the necessity for making searches for local land charges see PARA 20 post.

## **UPDATE**

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The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### **11-13 Restrictions under planning legislation ... Restrictions registrable as local land charges**

Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

## **11 Restrictions under planning legislation**

NOTES--Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

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## **12. Particular matters affecting user.**

Inquiries should be made of local authorities in appropriate cases, according to the nature of the property: (1) whether an order, draft order, scheme or draft scheme affecting the property has been made under the statutory provisions relating to trunk roads or special roads<sup>1</sup>; (2) whether any proposals for road construction or road widening affecting the property have been approved<sup>2</sup>; (3) whether the property is a prospectively maintainable highway for the purpose of the statutory street works code<sup>3</sup>; (4) whether any proceedings have been authorised for breach of building regulations<sup>4</sup>; (5) whether the property is likely to be purchased compulsorily by any local authority or statutory body having powers of compulsory acquisition<sup>5</sup>; and (6) in the case of country property, whether the property is affected by the legislation concerning the designation of national parks and of areas of outstanding natural beauty<sup>6</sup> and access to the countryside<sup>7</sup>.

1 See the Highways Act 1980 ss 10(5), 14(4), 18(4), Sch 1 Pts I, III (as amended); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 728 et seq.

2 As to compulsory purchase powers with respect to highway purposes see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 77 et seq.

3 See HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 411. A declaration by the local highway authority, that a street in its area is likely to become a maintainable highway, is registrable as a local land charge: New Roads and Street Works Act 1991 s 87(1), (2).

4 See generally BUILDING.

5 See PARA 15 post; and COMPULSORY ACQUISITION OF LAND.

6 See OPEN SPACES AND COUNTRYSIDE vol 77 (2010) PARA 636 et seq.

7 See OPEN SPACES AND COUNTRYSIDE vol 77 (2010) PARAS 513, 578 et seq.

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relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

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### **13. Restrictions registrable as local land charges.**

Restrictions as to user imposed or enforceable by a local authority over particular properties, including restrictions embodied in a condition attached to a consent, approval or licence given by a local authority, are in general registrable as local land charges<sup>1</sup>. Such restrictions may be discovered by search in the appropriate part of the local land charges register<sup>2</sup>, whether the land is registered land or not<sup>3</sup>, and in general no preliminary inquiry is necessary. In certain cases the legislation relating to local land charges is applied to restrictions imposed by authorities other than local authorities<sup>4</sup>.

1 See LAND CHARGES vol 26 (2004 Reissue) PARA 671 et seq. The definition of 'local land charge' excludes a condition in a planning permission granted before 1 August 1977 or deemed to be granted at any time under any statutory provision relating to town and country planning: see LAND CHARGES vol 26 (2004 Reissue) PARA 673.

2 This will normally be Parts 3 and 4 of the register: see LAND CHARGES vol 26 (2004 Reissue) PARAS 678-679. As to searches for local land charges generally see PARA 20 post.

3 See PARA 20 post.

4 Eg under the Highways Act 1980 ss 73, 74, Sch 9 (all as amended) (improvement and building lines imposed by a highway authority): see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARAS 491-501; LAND CHARGES vol 26 (2004 Reissue) PARA 672.

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Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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#### **14. Control of advertisements.**

Under regulations made under statutory powers for the control of advertisements<sup>1</sup>, the consent of the local planning authority or the Secretary of State<sup>2</sup> is required for the display of advertisements<sup>3</sup>, and although consent is not required in the case of certain excepted classes of advertisements<sup>4</sup>, the Secretary of State may direct that the exceptions are not to apply in a particular area or in a particular case<sup>5</sup>, and the authority may require the discontinuance of the display of advertisements which are within the excepted classes<sup>6</sup>. The authority may define any part of its area as an area of special control within which the display of advertisements is to be specially restricted<sup>7</sup>. A register of applications for consents and decisions on them must be kept by the authority<sup>8</sup>. Inquiries should therefore be made of the appropriate authorities<sup>9</sup> whether any consent is required in respect of the property to be purchased, whether there is any entry regarding any application for consent in the register of applications<sup>10</sup>, and whether the property is situated within an area of special control.

1 See the Town and Country Planning Act 1990 ss 220, 333 (both as amended); the Town and Country Planning (Control of Advertisements) Regulations 1992, SI 1992/666 (as amended); and TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARA 769 et seq.

2 I.e. one of Her Majesty's Principal Secretaries of State: see the Interpretation Act 1978 s 5, Sch 1. As to the office of Secretary of State see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 355.

3 See the Town and Country Planning (Control of Advertisements) Regulations 1992, SI 1992/666, reg 5; and TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARA 777.

4 See *ibid* reg 6; and TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARA 789.

5 See *ibid* reg 7; and TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARA 815.

6 See *ibid* reg 8; and TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARA 816.

7 See *ibid* regs 18, 19; and TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARAS 826, 828.

8 See *ibid* reg 21; and TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARA 822.

9 As to these authorities see PARA 11 note 7 ante.

10 The register is not normally searched unless the answer to the inquiry reveals that there is an entry: see PARA 22 post.

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## **15. Compulsory acquisition.**

Compulsory purchase orders are not, as a rule, registrable as such in the registers of land charges or local land charges<sup>1</sup>. It is therefore necessary to ascertain, by inquiries of the vendor and of the local authorities in the area where the property lies, whether there is any indication in any development plan or otherwise that the property is likely to be the subject of compulsory acquisition and whether any order has been made or resolution passed for its compulsory acquisition<sup>2</sup>. Inquiry should also be made whether any notice has been served in respect of the property under the provisions which entitle owner-occupiers to require the purchase of the property which cannot be sold at a reasonable price because of the adverse effect of proposals implying future acquisition<sup>3</sup>.

1 Orders which form an exception to the rule and which are registrable in the register of local land charges are: (1) orders under the New Towns Act 1981 ss 1, 10-12 (all as amended) (see TOWN AND COUNTRY PLANNING vol 46(3) (Reissue) PARA 1333 et seq); (2) wayleave orders for government oil pipelines under the Requisitioned Land and War Works Act 1948 s 14 (as amended) and under the Land Powers (Defence) Act 1958 ss 12(2), 17 (as amended) (see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARAS 528-529); (3) orders in favour of the Coal Authority and licensed operators in connection with the opencast working of coal under the Opencast Coal Act 1958 s 11(1) (as substituted), s 16(6) (as amended) (see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 422 et seq). As to the licensing of coal mining operations see the Coal Industry Act 1994 Pt II (ss 25-36); and MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARAS 91-106. See LAND CHARGES vol 26 (2004 Reissue) PARA 674.

2 As to inquiries as to the acquisition of rights over the property see PARA 17 post; and as to the conditions of sale providing against the possibility of compulsory acquisition see PARA 80 post.

3 See the Town and Country Planning Act 1990 Pt VI Ch II (ss 149-171) (as amended) (interests affected by planning proposals: blight); and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 545 et seq. As to the power of an owner of land to require its purchase on the refusal of permission to develop see PARA 11 ante.

## **UPDATE**

### **1-136 The Contract and Preliminary Matters**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(2) INQUIRIES AND SEARCHES BEFORE CONTRACT/(i) Inquiries and Inspection/B. PARTICULAR SUBJECTS OF INQUIRY/16. Boundaries, easements, local authority charges and sewers.

## **16. Boundaries, easements, local authority charges and sewers.**

The matters as to which inquiry should be made of the vendor include the ownership of the walls or fences bounding the property<sup>1</sup>, the liability to repair roads or paths abutting on the property<sup>2</sup>, the means of access to the property, the means of drainage<sup>3</sup> and the existence of any easements<sup>4</sup>, wayleaves, rights of light<sup>5</sup> or similar rights affecting the property or of any agreements conferring rights, for example a right to lay cables or wires, under or over the property.

In order to prevent the acquisition of a right to light by prescription, the owner of a servient tenement may register a notice in the register of local land charges for the purpose of preventing access of light to the dominant tenement being taken to be enjoyed without interruption. The owner of the dominant tenement may in certain circumstances bring proceedings to have the notice cancelled<sup>6</sup>. The existence of such a notice affecting the land to be purchased will be revealed on the search of the local land charges register<sup>7</sup>. Where such a notice has been registered, it seems that the purchaser should inquire of the vendor whether any action has been commenced or is contemplated in respect of the notice.

Inquiry should be made of the appropriate local authority whether the highways abutting on the property are maintainable at the public expense, and, if they are not, as to the application to the property of the enactments requiring advance payments to be made, or security to be given, in respect of the expenses of street works, by persons proposing to erect buildings abutting on private streets<sup>8</sup>. Expenses incurred by local authorities in making up private streets<sup>9</sup> in cases where the advance payments code does not apply constitute a charge upon the property affected which is registrable as a local land charge<sup>10</sup>; but no charge can be registered until money has been actually expended<sup>11</sup>, and resolutions of a local authority to execute works are not registrable. Inquiry should therefore be made by the purchaser of the vendor and of local authorities whether any outstanding notices have been served by an authority on the vendor. Inquiries should also be made of water authorities whether there is a public sewer available to serve the property<sup>12</sup>, whether the owner of the property is liable to contribute to the cost of maintaining any public sewer<sup>13</sup> and, in the case of property intended to be used for trade, what right there is to discharge trade effluent from the property into public sewers<sup>14</sup>.

1 As to statutory provisions regarding the ownership of party walls see BOUNDARIES vol 4(1) (2002 Reissue) PARAS 961 et seq.

2 As to inquiries of local authorities as to roads see the text to notes 8-11 infra.

3 As to inquiries of local authorities as to drainage see the text to notes 12-14 infra.

4 As to the existence of an undisclosed easement as a defect in title see PARA 57 post. Property is usually sold subject to easements affecting it: see PARA 89 post. As to easements generally see EASEMENTS AND PROFITS A PRENDRE.

5 As to light obstruction notices see the text to notes 6-7 infra. As to conditions designed to prevent the acquisition by the purchaser of rights of light over the vendor's property see PARA 81 post.

6 See the Rights of Light Act 1959 ss 2, 3 (s 2 as amended); and EASEMENTS AND PROFITS A PRENDRE; LAND CHARGES vol 26 (2004 Reissue) PARAS 674, 686.

7 As to this search generally see PARA 20 post. The normal rule set out in the Local Land Charges Act 1975 s 10 (as amended) (see LAND CHARGES vol 26 (2004 Reissue) PARA 694), that failure to register a local land charge does not affect its enforceability but may entitle a purchaser to compensation, does not apply to light obstruction notices: see LAND CHARGES vol 26 (2004 Reissue) PARA 686.

8 See the Highways Act 1980 ss 219-225 (as amended); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 179 et seq. As to matters under the advance payments code which are registrable in the register of local land charges see s 224; and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARAS 179-183, 187-189; LAND CHARGES vol 26 (2004 Reissue) PARA 674.

9 See under ibid ss 205-218 (as amended): see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARAS 149-169.

10 See PARA 126 post; and LAND CHARGES vol 26 (2004 Reissue) PARA 674.

11 See PARA 126 post.

12 As to the right to drain into public sewers generally see ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 46 (2010) PARA 1041 et seq.

13 As to contribution to cost of sewerage highways see ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 46 (2010) PARA 1039.

14 As to restrictions on the discharge of trade effluents see generally ENVIRONMENTAL QUALITY AND PUBLIC HEALTH vol 46 (2010) PARA 1047 et seq.

## **UPDATE**

### **1-136 The Contract and Preliminary Matters**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### **16 Boundaries, easements, local authority charges and sewers**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(2) INQUIRIES AND SEARCHES BEFORE CONTRACT/(i) Inquiries and Inspection/B. PARTICULAR SUBJECTS OF INQUIRY/17. Rights in favour of government departments and public authorities.

### **17. Rights in favour of government departments and public authorities.**

Certain enactments which authorise government departments or public authorities to create or require easements, wayleaves or other rights over land provide that the relevant order must be registered in the register of local land charges<sup>1</sup>, and in such cases it is unnecessary to make a preliminary inquiry. Certain enactments conferring similar authority do not provide for registration<sup>2</sup>, and, in an appropriate case, it may be advisable to inquire whether any acquisition of a right has taken place or is pending.

1 See eg AIR LAW vol 2 (2008) PARAS 186, 223; MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 422 et seq. As to the registration of wayleave orders relating to oil pipelines see PARA 15 note 1 ante; and LAND CHARGES vol 26 (2004 Reissue) PARA 674; WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARAS 528-529. As to easements etc generally see EASEMENTS AND PROFITS A PRENDRE.

2 See eg the Atomic Energy Act 1946 s 7 (as amended); and FUEL AND ENERGY vol 19(3) (2007 Reissue) PARAS 1427-1428.

## **UPDATE**

### **1-136 The Contract and Preliminary Matters**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(2) INQUIRIES AND SEARCHES BEFORE CONTRACT/(i) Inquiries and Inspection/B. PARTICULAR SUBJECTS OF INQUIRY/18. Outgoings.

## **18. Outgoings.**

The vendor should be asked what is the amount of council tax payable each year in respect of the property<sup>1</sup>, whether the property is subject to any other outgoings<sup>2</sup>, and for particulars of any insurance policy against fire or other damage to the property<sup>3</sup>.

1 As to the amount of council tax payable see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARAS 243-267; and as to valuation lists see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARAS 268-278.

2 For the meaning of 'outgoings' see PARA 125 post. Where the property is subject to a ground rent or rentcharge and has been part of a larger property which has been developed and sold in lots, inquiry should be made as to any liability which may fall on the purchaser to collect apportioned parts of the ground rent or rentcharge from adjoining owners and to pay the whole ground rent or rentcharge to the freeholder or owner of the rentcharge. As to legal and equitable apportionments see the Rentcharges Act 1977 ss 4, 13; and RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 844 et seq; and as to the redemption and extinguishment of existing rentcharges see s 3; and RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 894.

3 As to the respective rights of a vendor and purchaser in relation to an insurance policy effected by the vendor see PARAS 117-118 post.

## **UPDATE**

### **1-136 The Contract and Preliminary Matters**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(2) INQUIRIES AND SEARCHES BEFORE CONTRACT/ (ii) Searches/19. The National Conveyancing Protocol.

## **(ii) Searches**

### **19. The National Conveyancing Protocol.**

In residential freehold conveyancing the use of preliminary inquiries addressed to the vendor is now regulated by The National Conveyancing Protocol<sup>1</sup>, which provides for the vendor and his solicitor<sup>2</sup> to prepare a package of information for the purchaser. The package includes the Seller's Property Information Form, which comprises a standardised set of preliminary inquiries.



The first part of the form is to be completed by the vendor and the second part by the vendor's solicitor.

In the case of a leasehold property the package includes a Seller's Leasehold Information Form, again divided into parts to be completed by the vendor and the vendor's solicitor respectively. The leasehold information form is designed to be used in both residential and commercial transactions.

1 See The National Conveyancing Protocol (3rd Edn, 1994), published by The Law Society. The National Conveyancing Protocol was introduced in 1990.

2 See PARA 3 ante.

## **UPDATE**

### **1-136 The Contract and Preliminary Matters**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(2) INQUIRIES AND SEARCHES BEFORE CONTRACT/ (ii) Searches/20. The local land charges register.

### **20. The local land charges register.**

The registration of any instrument or matter under the Local Land Charges Act 1975 is deemed to constitute actual notice of the instrument or matter to all persons and for all purposes connected with the land affected<sup>1</sup>, and, if any matter has been so registered at the date of a contract for sale, it seems that the purchaser may be bound to complete, even though the vendor has contracted to sell free from incumbrances<sup>2</sup>. Subject to certain exceptions<sup>3</sup>, failure to register a local land charge does not affect the enforceability of the charge; but a purchaser who has searched the register and who suffers loss by reason of the non-registration of the charge, or in the case where the register is kept otherwise than in documentary form and entitlement to search in that register was not satisfied, or in the case of an official search by reason of the non-disclosure of the charge, may be entitled to compensation<sup>4</sup>. It is therefore necessary for the purchaser before contract to search<sup>5</sup> the local land charges register<sup>6</sup> for matters registrable in it<sup>7</sup>. The registers are maintained by district councils, London borough councils and the Common Council of the City of London, and the search must be made of the appropriate register for the area or areas in which the land is situated<sup>8</sup>. If the search does not provide sufficient information, the matter must be taken up by further inquiries of the vendor and of the local authority<sup>9</sup>.

1 See the Law of Property Act 1925 s 198(1) (as amended); and EQUITY vol 16(2) (Reissue) PARA 577; LAND CHARGES vol 26 (2004 Reissue) PARA 693. As to local land charges affecting registered land see LAND REGISTRATION vol 26 (2004 Reissue) PARA 807.

2 See PARA 54 post.

3 See the Local Land Charges Act 1975 s 11 (as amended); and LAND CHARGES vol 26 (2004 Reissue) PARA 694.

4 See *ibid* s 10 (as amended); and LAND CHARGES vol 26 (2004 Reissue) PARA 694.

5 As to the mode of search see LAND CHARGES vol 26 (2004 Reissue) PARA 705 et seq. Entries in the register of local land charges are against the land affected: see *ibid* s 5(3); and LAND CHARGES vol 26 (2004 Reissue) PARA 689. See however, the names register for charges registrable under the Land Charges Act 1972: see PARA 21 post; and LAND CHARGES vol 26 (2004 Reissue) PARAS 609, 689.

6 As to the parts into which the register is divided, and the contents of the different parts see LAND CHARGES vol 26 (2004 Reissue) PARAS 676-687.

7 As to the registration of planning matters see PARA 11 notes 3, 17, 19 ante; as to the registration of restrictions on user imposed by local authorities and other authorities, local authority charges and rights in favour of government departments see PARA 13 ante; as to the registration of certain compulsory purchase orders see PARA 15 note 1 ante; as to the registration of light obstruction notices see PARA 16 ante; and as to the full list of matters which are registrable see LAND CHARGES vol 26 (2004 Reissue) PARA 671 et seq.

8 See the Local Land Charges Act 1975 s 4 (as amended); the Interpretation Act 1978 ss 5, 22, Sch 1, Sch 2 para 6 (as amended); and LAND CHARGES vol 26 (2004 Reissue) PARA 688.

9 As to preliminary inquiries of vendors and local authorities see generally para 5 ante.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(2) INQUIRIES AND SEARCHES BEFORE CONTRACT/ (ii) Searches/21. The land charges register.

### 21. The land charges register.

Although the entry of a matter in the registers kept at the Land Registry<sup>1</sup> is notice to the purchaser<sup>2</sup>, these registers are not normally searched before contract, since it is not known at that time against what names such a search should be made<sup>3</sup>.

1 See LAND CHARGES vol 26 (2004 Reissue) PARA 607.

2 See the Law of Property Act 1925 s 198(1) (as amended); and EQUITY vol 16(2) (Reissue) PARA 577; LAND CHARGES vol 26 (2004 Reissue) PARA 616. See also note 3 *infra*.

3 See PARA 167 post. Any question as to the purchaser's knowledge of a centrally registered land charge is to be determined by reference to his actual knowledge and without regard to the actual notice deemed to be given by registration: see the Law of Property Act 1969 s 24; and PARA 54 post. As to the statutory scheme of compensation for a purchaser who suffers loss because he is bound by a registered charge registered against the names of estate owners undiscoverable from the relevant title see s 25 (as amended); and LAND CHARGES vol 26 (2004 Reissue) PARA 617. As to searches which in the case of registered land take the place of searches in the register of land charges see PARA 169 post; and as to searches to see if land is registered see PARA 2 ante.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(2) INQUIRIES AND SEARCHES BEFORE CONTRACT/ (ii) Searches/22. Searches in other registers.

## **22. Searches in other registers.**

Searches are normally made before contract in the register of agricultural charges<sup>1</sup> if the property to be sold includes farm property, and in the registers kept by the Registrar of Companies<sup>2</sup> where the vendor is a company.

Search must be made in the registers of rents kept by the president of every rent assessment panel under the legislation relating to restricted contracts<sup>3</sup> and the registers of enforcement notices, stop notices, applications for planning permission<sup>4</sup> and applications for consent to the display of advertisements<sup>5</sup> kept under planning legislation, if the preliminary inquiries of local authorities have revealed the existence of an entry affecting the property to be sold. Where the property is vacant land on which no building has ever been erected, a search should be made in the commons register, although there is room for discretion where the property is surrounded by densely built-up land<sup>6</sup>.

In areas affected by mining, whether the mining operations are current or not, a search should be made of the Coal Authority<sup>7</sup>. If the property is in the Forest of Dean, inquiries should be made additionally to the Deputy Gaveler and Crown Receiver of the Forestry Commission<sup>8</sup>.

1 See AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1331; LAND CHARGES vol 26 (2004 Reissue) PARA 697. Registration constitutes actual notice of the charge: see AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1331.

2 See COMPANIES vol 15 (2009) PARA 1279 et seq; LAND CHARGES vol 26 (2004 Reissue) PARAS 606, 697. See also *Property Discount Corp Ltd v Lyon Group Ltd* [1981] 1 All ER 379, [1981] 1 WLR 300, CA.

3 See PARA 8 ante. In the case of a protected tenancy, the register of rents is kept by the rent officer and should be searched as appropriate.

4 See PARA 11 ante.

5 See PARA 14 ante.

6 See *G & K Ladenbau (UK) Ltd v Crawley and de Reya* [1978] 1 All ER 682, [1978] 1 WLR 266, where a solicitor was negligent in failing to search the commons register. As to commons registration generally see COMMONS vol 13 (2009) PARA 506 et seq.

7 See MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 107 et seq; and EF & P vol 35 (1997 Reissue) SALE OF LAND PARAS 44[74], 170.2.11[208].

8 See MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 608 et seq. For a list of searches see EF & P vol 35 (1997 Reissue) SALE OF LAND PARA 170.2.

## **UPDATE**

### **1-136 The Contract and Preliminary Matters**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (3) FORMATION OF THE CONTRACT/(i) Requirements for the Existence of the Contract/23. Offer and acceptance.

### **(3) FORMATION OF THE CONTRACT**

#### **(i) Requirements for the Existence of the Contract**

##### **23. Offer and acceptance.**

The formation of a contract for the sale of land is governed by the same legal rules as any other contract<sup>1</sup>, and it is only necessary to consider here the application of the general law to the particular subject matter of the sale of land. Thus a contract for the sale of land may be made either by private agreement between the parties or by public auction<sup>2</sup>; but, however made, it must contain the ordinary essentials of a contract, namely an offer by one party to the other, and an acceptance of that offer by the party to whom it was made<sup>3</sup>. The acceptance may be subject to the execution of a formal contract in which case there is no binding agreement until formal contracts are exchanged<sup>4</sup>.

Subject to any express instructions, a solicitor<sup>5</sup> employed to act in a contract for the sale of land has implied and ostensible authority to effect an exchange of contracts binding his client by any method effective to constitute the exchange, including an exchange agreed by solicitors over the telephone<sup>6</sup> and an exchange effected by means of a document exchange<sup>7</sup>.

Where the offer and acceptance are contained in correspondence between the parties, it is a matter of construction whether or not there is a concluded contract<sup>8</sup>.

1 See CONTRACT vol 9(1) (Reissue) PARA 631 et seq. An agreement for the discharge of a debt conditional on the transfer of land is not a contract for the sale of land: *Simpson v Connolly* [1953] 2 All ER 474, [1953] 1 WLR 911.

2 See AUCTION vol 2(3) (Reissue) PARA 201 et seq.

3 See CONTRACT vol 9(1) (Reissue) PARA 631 et seq. A statement that the owner will favourably consider an offer is not an offer in law which can be accepted: *Montreal Gas Co v Vasey* [1900] AC 595, PC. A promise to sell or to purchase at a price to be agreed upon is not enforceable until the price has been agreed: *Loftus v Roberts* (1902) 18 TLR 532, CA. A statement of the lowest price at which a person will sell even if made in answer to an inquiry is not an offer to sell at that price: *Harvey v Facey* [1893] AC 552, PC. An offer to sell at a named price is not necessarily a binding offer to sell: *Clifton v Palumbo* [1944] 2 All ER 497, CA; cf *Bigg v Boyd Gibbins Ltd* [1971] 2 All ER 183, [1971] 1 WLR 913, CA. As to options to purchase see PARA 27 post. An offer accepted by an agent which requires ratification can be withdrawn at any time before ratification: *Watson v Davies* [1931] Ch 455; and see AGENCY vol 1 (2008) PARA 58.

4 See CONTRACT vol 9(1) (Reissue) PARAS 637, 671; and *Harrison v Battye* [1974] 3 All ER 830, [1975] 1 WLR 58, CA.

5 See PARA 3 ante.

6 *Domb v Isoz* [1980] Ch 548, [1980] 1 All ER 942, CA. See the alternative formulae recommended by The Law Society in 'Council News *Domb v Isoz* Arrangements for Effecting Exchange of Contracts by Telephone or Telex' (1980) 77 Law Society's Gazette 144; and see the Standard Conditions of Sale (3rd Edn), conditions 1, 2. As to the Standard Conditions of Sale see PARA 1 note 9 ante.

7 As to the use of a document exchange see 'The Law Society's Formulae for Exchanging Contracts by Telephone/Telex' (1984) 81 Law Society's Gazette 1891.

8 See eg *Bigg v Boyd Gibbins Ltd* [1971] 2 All ER 183, [1971] 1 WLR 913, CA; *Storer v Manchester City Council* [1974] 3 All ER 824, [1974] 1 WLR 1403, CA; *Gibson v Manchester City Council* [1979] 1 All ER 972, [1979] 1 WLR 294, HL; and CONTRACT vol 9(1) (Reissue) PARAS 637, 671. The contract must be in writing and signed by both parties: see PARAS 29-40 post. In the case of contracts by correspondence, the statutory conditions of sale apply: see PARA 76 note 6 post.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (3) FORMATION OF THE CONTRACT/(i) Requirements for the Existence of the Contract/24. Offer at auction.

#### 24. Offer at auction.

On a sale by auction, the offer is made by the purchaser in the form of the bid which is ultimately accepted by the auctioneer as the agent of the vendor<sup>1</sup>. A contract made in the course of a public auction is exempt from the statutory requirement that a contract for the sale of land be in writing<sup>2</sup>, and it follows that the contract is complete when the successful bid is accepted by the auctioneer. The advertisement of the sale is not itself an offer, but only a declaration of intention to hold the sale and to allow the public generally to make offers<sup>3</sup>.

1 See AUCTION vol 2(3) (Reissue) PARAS 206 et seq. If the auctioneer exceeds his authority by offering rights, eg riparian rights, which the vendor did not intend to be included in the sale, there is, it seems, no contract which can be specifically enforced: see *Hammond v Chubb* (1915) 138 LT Jo 360. As to the auctioneer's authority to sign the contract see PARA 40 post; and AUCTION vol 2(3) (Reissue) PARA 214.

2 See the Law of Property (Miscellaneous Provisions) Act 1989 s 2(5)(b). As to the requirement of a written contract see PARAS 29-40 post.

3 *Harris v Nickerson* (1873) LR 8 QB 286. Hence no action will lie against the proposing vendor for not holding the sale: *Harris v Nickerson* supra. As to withdrawal of the property from sale see AUCTION vol 2(3) (Reissue) PARA 249. A bid, like any other offer, may be retracted before it is accepted, ie before the fall of the auctioneer's hammer: see *Payne v Cave* (1789) 3 Term Rep 148. As to offer and acceptance see CONTRACT vol 9(1) (Reissue) PARAS 631-675.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (3) FORMATION OF THE CONTRACT/(i) Requirements for the Existence of the Contract/25. Consents.

## 25. Consents.

If a lease requires the landlord's consent to be obtained to an assignment, it is the duty of the vendor who agrees to assign the lease to obtain the necessary licence<sup>1</sup>.

There are statutory restrictions on the disposition of land held by or in trust for a charity<sup>2</sup>. In certain exceptional cases no disposition can be made without the consent of the court or the Charity Commissioners<sup>3</sup>. In such cases, an unconditional contract for the sale of such charity land made before the requisite consent has been obtained is unlawful and void<sup>4</sup>, and the purchaser can recover his deposit<sup>5</sup>. Outside those exceptional cases, the land may be disposed of by the charity trustees on compliance with various statutory conditions which must be carried out before entering into an agreement for the sale, or, as the case may be, for a lease or other disposition, of the land, such as obtaining and considering a written report on the proposed disposition from a qualified surveyor instructed by the trustees and acting exclusively for the charity, advertising the proposed disposition for such period and in such manner as the surveyor has advised in his report (unless he has there advised that it would not be in the best interests of the charity to advertise the proposed disposition), and deciding that they are satisfied, having considered the surveyor's report, that the terms on which the disposition is proposed to be made are the best that can reasonably be obtained for the charity<sup>6</sup>. Where the latter restrictions on disposition apply, the contract must be made conditional upon compliance with the statutory restrictions<sup>7</sup>.

Many dispositions of land by local authorities are precluded without the necessary consent<sup>8</sup>. However, in favour of a person claiming under the local authority, the lack of consent does not invalidate the transaction, and a person dealing with or claiming under the authority is not concerned to see or inquire whether such consent has been obtained<sup>9</sup>.

1 See eg *Ellis v Rogers* (1885) 29 ChD 661, CA; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 547. See further PARA 240 post, which also considers the question of the time within which the consent must be obtained. As to conditions providing for the possibility of refusal of consent see PARA 94 post.

2 See the Charities Act 1993 ss 36, 37 (as amended); and CHARITIES vol 8 (2010) PARAS 395-397.

3 See *ibid* s 36(1); and CHARITIES vol 8 (2010) PARA 395.

4 See *ibid* ss 36(1), 37(1); *Bishop of Bangor v Parry* [1891] 2 QB 277; and CHARITIES vol 8 (2010) PARAS 395-397.

5 See *Milner v Staffordshire Congregational Union Inc* [1956] Ch 275, [1956] 1 All ER 494.

6 See the Charities Act 1993 s 36(3); and CHARITIES vol 8 (2010) PARA 395.

7 See *ibid* s 37(1) (see CHARITIES vol 8 (2010) PARA 397); and *Manchester Diocesan Council for Education v Commercial and General Investments Ltd* [1969] 3 All ER 1593, [1970] 1 WLR 241; *Michael Richards Properties Ltd v Corp'n of Wardens of St Saviour's Parish, Southwark* [1975] 3 All ER 416; *Haslemere Estates Ltd v Baker* [1982] 3 All ER 525, [1982] 1 WLR 1109.

8 See the Local Government Act 1972 ss 123, 127 (both as amended); and LOCAL GOVERNMENT vol 69 (2009) PARAS 515, 520.

9 See *ibid* s 128(2); and LOCAL GOVERNMENT vol 69 (2009) PARA 529.

## UPDATE

## 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (3) FORMATION OF THE CONTRACT/(i) Requirements for the Existence of the Contract/26. Conditional contracts.

### 26. Conditional contracts.

Contracts for the sale of land are not infrequently made dependent on the occurrence of some event. The effect of such a qualification may be to deny the existence of any contract at all. The commonest example of this is the phrase 'subject to contract' and its equivalents, which must be distinguished from phrases indicating the existence of a provisional but binding agreement<sup>1</sup>. In the case of qualifications such as 'subject to survey of the property'<sup>2</sup>, 'subject to a satisfactory survey'<sup>3</sup>, 'subject to a satisfactory mortgage'<sup>4</sup>, and 'subject to planning permission to develop'<sup>5</sup>, it is a question of construction whether the qualification precludes the existence of a contract, leaving the parties still in negotiation, or whether there is a contract which is concluded but enforceable only on the occurrence of the condition<sup>6</sup>. In the latter case, it follows, *inter alia*, that neither party can withdraw from the contract pending the occurrence of the condition<sup>7</sup>, and that the purchaser immediately acquires an equitable interest in the land<sup>8</sup>. The trend of decisions is in favour of treating such qualifications as not being inconsistent with the existence of a concluded contract, but rather as amounting to a condition precedent upon which the contract depends<sup>9</sup>. In the case of a conditional contract, where one party has the power to decide whether the condition has been fulfilled, it will be implied that such party must act reasonably. Thus if a contract for the sale of land is subject to a satisfactory survey, the purchaser must obtain a survey from a competent person and must act in good faith in considering whether it is satisfactory<sup>10</sup>. Where the condition is for the benefit of one party alone, that party may waive it and enforce the contract<sup>11</sup>. If the condition is unfulfilled the contract will fail. If the condition is void for uncertainty, no contract comes into existence<sup>12</sup>.

1 See CONTRACT vol 9(1) (Reissue) PARA 671.

2 See *Ee v Kakar* (1979) 40 P & CR 223.

3 See *Marks v Board* (1930) 46 TLR 424.

4 See *Lee-Parker v Izzet (No 2)* [1972] 2 All ER 800, [1972] 1 WLR 775.

5 See *Batten v White* (1960) 12 P & CR 66. Where a contract is conditional on the obtaining of planning permission it is a question of construction whether the condition is fulfilled by the obtaining of outline permission: see *Hargreaves Transport Ltd v Lynch* [1969] 1 All ER 455, [1969] 1 WLR 215, CA; *Richard West & Partners (Inverness) Ltd v Dick* [1969] 2 Ch 424, [1969] 1 All ER 943, CA. See further CONTRACT vol 9(1) (Reissue) PARA 670.

6 See *Batten v White* (1960) 12 P & CR 66; *Ee v Kakar* (1979) 40 P & CR 223.

7 See eg *Smallman v Smallman* [1972] Fam 25, [1971] 3 All ER 717, CA, where it was held that an agreement subject to the approval of the court is binding before such approval is given, and neither party can rescind.

8 *Gordon Hill Trust Ltd v Segall* [1941] 2 All ER 379, CA. A conditional contract would, it seems, be registrable as an estate contract under the Land Charges Act 1972 s 2(4) (as amended) (see LAND CHARGES vol 26 (2004 Reissue) PARAS 628, 632), and in the case of registered land could be protected by a caution under the Land Registration Act 1925 s 54 (as amended) (see LAND REGISTRATION vol 26 (2004 Reissue) PARAS 992-993). See *Haslemere Estates Ltd v Baker* [1982] 3 All ER 525, [1982] 1 WLR 1109.

9 See *Batten v White* (1960) 12 P & CR 66; *Ee v Kakar* (1979) 40 P & CR 223. Cases which had tended to favour the construction of such qualifications as precluding the existence of a contract (eg *Marks v Board* (1930) 46 TLR 424; *Astra Trust Ltd v Adams and Williams* [1969] 1 Lloyd's Rep 81) may now be taken as disapproved. As to conditional contracts other than in a conveyancing context see *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd* [1968] 1 All ER 104 at 109, [1968] 1 WLR 74 at 83, CA, per Diplock LJ; *Wood Preservation Ltd v Prior (Inspector of Taxes)* [1968] 2 All ER 849 at 855, [1969] 1 WLR 1077 at 1090 per Goff J (aff'd [1969] 1 All ER 364, [1969] 1 WLR 1077 at 1094, CA).

10 *Ee v Kakar* (1979) 40 P & CR 223. See also *100 Main Street Ltd v WB Sullivan Construction Ltd* (1978) 20 OR (2d) 401, 88 DLR (3d) 1, Ont CA, where it was held that where a contract is conditional on the vendor's obtaining the consent of the mortgagee to the sale, there is an implied obligation on the purchaser to co-operate in obtaining the consent; *Sinclair-Hill v Sothcott* (1973) 26 P & CR 490, where the vendor, who had lodged a planning application before contract, was held to be under an implied obligation not to withdraw it after contract without the purchaser's consent.

11 *Heron Garage Properties Ltd v Moss* [1974] 1 All ER 421, [1974] 1 WLR 148; *Ee v Kakar* (1979) 40 P & CR 223, *Balbosa v Ayoub Ali* [1990] 1 WLR 914, 134 Sol Jo 545, PC; *Graham v Pitkin* [1992] 2 All ER 235, [1992] 1 WLR 403, PC; cf *Boobyer v Thornville Properties Ltd* (1968) 19 P & CR 768; *Federated Homes Ltd v Turner* [1975] 1 EGLR 147, (1974) 233 Estates Gazette 845.

12 See eg *Lee-Parker v Izzet (No 2)* [1972] 2 All ER 800, [1972] 1 WLR 775, where a contract for sale 'subject to the purchaser obtaining a satisfactory mortgage' was void for uncertainty; but cf the questioning of that decision in *Graham v Pitkin* [1992] 2 All ER 235 at 237, [1992] 1 WLR 403 at 405, PC. Cf *Lee-Parker v Izzet* [1971] 3 All ER 1099 at 1105, not reported on this point at [1971] 1 WLR 1688, where completion was to be within 28 days of the vendor arranging 'a satisfactory mortgage', and this phrase was construed as a mortgage to the satisfaction of the purchaser acting reasonably, and the contract was valid; and *Janmohamed v Hassam* [1977] 1 EGLR 142, (1976) Times, 10 June. See also CONTRACT vol 9(1) (Reissue) PARA 672.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### 26 Conditional contracts

NOTE 8--Land Registration Act 1925 repealed and replaced by the Land Registration Act 2002; see LAND REGISTRATION.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (3) FORMATION OF THE CONTRACT/(i) Requirements for the Existence of the Contract/27. Option to purchase.

### 27. Option to purchase.

An option to purchase is, in effect, an offer to sell, irrevocable for a stated period or until a stated event, made by the grantor of the option to the grantee, which the grantee is entitled to convert into a concluded contract of purchase on giving the prescribed notice and otherwise complying with the conditions on which the option is made exercisable in any particular case<sup>1</sup>.



There must be a binding contract to keep the offer open which requires either a deed or valuable consideration. Specific performance will not be granted of a voluntary contract, even if made by deed<sup>2</sup>, but the decree may be awarded where the consideration is merely nominal<sup>3</sup>. Where the parties do not stand in the relationship of landlord and tenant, the option will normally be contained in a separate agreement<sup>4</sup>. An option conferred on a tenant to purchase the reversion will normally be contained in the lease; however, such an option is collateral to, and not an incident of, the relationship of landlord and tenant<sup>5</sup>. If the option is phrased so as to be not merely personal to the grantor, and is capable of being enforced by a decree of specific performance, it will create an equitable interest in the land<sup>6</sup>. Such an option is a contract for the sale or other disposition of an interest in land and must therefore satisfy the statutory requirements as to a written contract<sup>7</sup>. However, a notice by the purchaser exercising the option does not create a new contract and therefore there is no need for the statutory requirements to be satisfied a second time<sup>8</sup>. If the option is to purchase a legal estate, it must be protected by registration in order to bind a purchaser of the legal estate<sup>9</sup>, although failure to register will not affect the grantor's contractual liability<sup>10</sup>.

So far as an option to purchase creates an interest in land, it is governed by the rule against perpetuities<sup>11</sup>. Any terms which are conditions precedent to the exercise of the option must be strictly observed<sup>12</sup>.

Prima facie an option to purchase is binding on the grantor's personal representatives; the presumption is rebutted only if the option itself states that it is personal to the grantor, or if the option is of such a nature as to be substantially incapable of vicarious performance<sup>13</sup>. Where the option does bind the grantor's estate, it may be properly exercised by notice to the personal representatives<sup>14</sup>. The question whether the benefit of the option is personal to the grantee or is assignable (and thus on death passes to his personal representatives) is a question of construction in the light of the relevant surrounding circumstances<sup>15</sup>. Like the original grantee, an assignee or personal representative must strictly observe any conditions precedent to the exercise of the option<sup>16</sup>.

The exercise of an option to purchase creates the relationship of vendor and purchaser from the date of the expiry of the notice exercising the option<sup>17</sup>. Whether, in the case of a tenant's option to purchase the reversion, the establishment of the relationship of vendor and purchaser also operates to determine the lease depends on the intention of the parties to be ascertained from the terms of the agreement<sup>18</sup>. The contract of sale arising from the exercise of the option will be an open contract unless conditions of sale have been included in the option contract itself<sup>19</sup>.

The document creating an option to purchase is liable to ad valorem stamp duty as a conveyance on sale<sup>20</sup>.

1 *Griffith v Pelton* [1958] Ch 205 at 225, [1957] 3 All ER 75 at 83, CA, per Jenkins LJ. See also *Stromdale and Ball Ltd v Burden* [1952] Ch 223 at 235, [1952] 1 All ER 59 at 65 per Danckwerts J; *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314 at 317, [1960] 1 WLR 549 at 556 per Buckley J (not considered on appeal [1961] Ch 105, [1961] 1 All ER 90, CA); *Re Button's Lease, Inman v Button* [1964] Ch 263 at 267, [1963] 3 All ER 708 at 710 per Plowman J; *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 at 928-929, [1977] 2 All ER 62 at 71, HL, per Lord Diplock, at 945 and at 84 per Lord Simon of Glaisdale, and at 951 and at 88-89 per Lord Salmon; *Mountford v Scott* [1975] Ch 258 at 264, [1975] 1 All ER 198 at 200, CA, per Russell LJ. Cf *Varty v British South Africa Co* [1965] Ch 508 at 522, [1964] 2 All ER 975 at 981, CA, obiter per Diplock LJ (revsd on other grounds [1966] AC 381, [1965] 2 All ER 395, HL). See further CONTRACT vol 9(1) (Reissue) PARA 640. As to the distinction between an option to purchase and a conditional contract of sale see *Helby v Matthews* [1895] AC 471, HL; *Spiro v Glencrown Properties Ltd* [1991] Ch 537, [1991] 1 All ER 600. For an example of an option terminable by notice given by the grantor see *Re Downes and Lobbs' Contract, Downes v Lobbs* [1937] 4 All ER 324 (affd sub nom *Re Down's Agreement* (1938) 82 Sol Jo 373, CA), where the option was to operate for three years certain and was then determinable by the grantor giving 12 months' notice to terminate at the expiration of the three years or at any later date, and a notice given before the end of the second year to terminate the option at the end of the third year was held to be valid. See also *Westway Homes Ltd v Moores* [1991] 2 EGLR 193, [1991] 31 EG 57, CA (effect of words 'subject to contract' in a notice purporting to exercise an option).

2 See *Jefferys v Jefferys* (1841) Cr & Ph 138; *Mountford v Scott* [1975] Ch 258, [1975] 1 All ER 198, CA; and SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 805.

3 *Mountford v Scott* [1975] Ch 258, [1975] 1 All ER 198, CA, (where an option to purchase a house worth £10,000 was granted in consideration of £1). See also *Midland Bank Trust Co Ltd v Green* [1981] AC 513, [1981] 1 All ER 153, HL, (where an option to purchase land worth at least £40,000 was granted in consideration of £1).

4 See eg *Re Downes and Lobbs' Contract, Downes v Lobbs* [1937] 4 All ER 324 (affd sub nom *Re Down's Agreement* (1938) 82 Sol Jo 373, CA); *Kelly v Enderton* [1913] AC 191, PC. An option may also be granted by will, in which case it operates as a conditional gift: see *Re Armstrong's Will Trusts, Graham v Armstrong* [1943] Ch 400, [1943] 2 All ER 537. If the purchase price stipulated in the option is less than the market value of the land, the grantee of the option must, subject to any contrary direction in the will, pay what is now inheritance tax on the bounty element: see *Re Lander, Lander v Lander* [1951] Ch 546, [1951] 1 All ER 622; and INHERITANCE TAXATION vol 24 (Reissue) PARA 637; WILLS vol 50 (2005 Reissue) PARA 416. Equally, in the case of an option granted inter vivos, a purchase price less than market value may be a transfer of value for the purposes of inheritance tax: see INHERITANCE TAXATION vol 24 (Reissue) PARAS 442-453, 635. An option may be conferred by a deed on a person who is not a party to the deed: *Stromdale and Ball Ltd v Burden* [1952] Ch 223, [1952] 1 All ER 59 (applying the Law of Property Act 1925 s 56(1)): see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 61. As to whether s 56(1) applies to an instrument other than a deed see *Beswick v Beswick* [1968] AC 58 at 104-106, [1967] 2 All ER 1197 at 1222-1224, HL, per Lord Upjohn, at 76 and at 1204 per Lord Reid, and at 94 and at 1216 per Lord Pearce; and CONTRACT vol 9(1) (Reissue) PARA 617.

5 *Griffith v Pelton* [1958] Ch 205 at 225, [1957] 3 All ER 75 at 84, CA, per Jenkins LJ. Whether the benefit of such an option is assignable is a question of construction. If the benefit is assignable, it may be passed by an assignment of the lease: *Griffith v Pelton* supra; *Re Button's Lease, Inman v Button* [1964] Ch 263, [1963] 3 All ER 708; see further LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 135. An option in a tenancy agreement to purchase the freehold 'at any time' may mean, according to the true construction of the agreement, at any time during the contractual tenancy, not during a subsequent statutory tenancy: *Longmuir v Kew* [1960] 3 All ER 26, [1960] 1 WLR 862. As to the statutory right of a tenant of a dwelling house to acquire the freehold where the lease is a long lease at a low rent, under the Leasehold Reform Act 1967 see LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1389 et seq.

6 See *Birmingham Canal Co v Cartwright* (1879) 11 ChD 421 at 434-435 per Fry J; and EQUITY vol 16(2) (Reissue) PARAS 410-411, 601 et seq; SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARAS 801 et seq, 825.

7 See the Law of Property (Miscellaneous Provisions) Act 1989 s 2(1); and PARA 29 et seq post.

8 *Spiro v Glencrown Properties Ltd* [1991] Ch 537, [1991] 1 All ER 600; and see PARA 30 post.

9 Where the title is unregistered, the option must be registered under the Land Charges Act 1972 s 2(4) (as amended), Class C(iv): see LAND CHARGES vol 26 (2004 Reissue) PARAS 628, 632. Failure to register renders the option void against a purchaser of a legal estate for money or money's worth: see s 4(6) (as amended) (LAND CHARGES vol 26 (2004 Reissue) PARA 634); and *Midland Bank Trust Co Ltd v Green* [1981] AC 513, [1981] 1 All ER 153, HL. Where the title is registered, protection is by notice or caution under the Land Registration Act 1925: see Pt IV (ss 48-62) (as amended); and LAND REGISTRATION vol 26 (2004 Reissue) PARA 995 et seq. Failure to protect renders the option void against a transferee for value in good faith (see ss 20, 23, 59(6) (all as amended) (see LAND REGISTRATION); *Peffer v Rigg* [1978] 3 All ER 745, [1977] 1 WLR 285) unless the option holder is in actual occupation of the land affected, when he will have an overriding interest within the Land Registration Act 1925 s 70(1)(g) (see LAND REGISTRATION vol 26 (2004 Reissue) PARAS 863 et seq, 960 et seq) (*Webb v Pollmount Ltd* [1966] Ch 584, [1966] 1 All ER 481). Failure by the option holder's solicitor to register the option is capable of constituting negligence actionable in both contract and tort: *Midland Bank Trust Co Ltd v Hett, Stubbs and Kemp (a firm)* [1979] Ch 384, [1978] 3 All ER 571.

For the requirement of certainty in an option to renew see *Brown v Gould* [1972] Ch 53, [1971] 2 All ER 1505, where the option specified factors to be applied in fixing a new rent, but laid down no machinery for fixing the rent; it was held to be valid because, in the absence of agreement between the parties, the court could fix the rent by applying the specified factors.

10 *Wright v Dean* [1948] Ch 686, [1948] 2 All ER 415; *Hollington Bros Ltd v Rhodes* [1951] 2 All ER 578n. In both these cases the grantor was held liable in damages, the option having been defeated by a purchaser for non-registration. It would seem to follow that specific performance could be awarded if the grantor or his estate still held the land. Damages may include loss of profit from an intended development: *Cottrill v Steyning and Littlehampton Building Society* [1966] 2 All ER 295, [1966] 1 WLR 753. The grantor may be entitled to an indemnity from the second purchaser who defeats the option for non-registration: see *Eagon v Dent* [1965] 3 All ER 334, applying what is now the Standard Conditions of Sale (3rd Edn), condition 3.3.2(d). As to the Standard Conditions of Sale see PARA 1 note 9 ante.

11 *London and South Western Rly Co v Gomm* (1882) 20 ChD 562, CA. In the case of an option created after 15 July 1964, the position is governed by the Perpetuities and Accumulations Act 1964 ss 9, 10: see generally

PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARAS 1037-1039. An option to renew a lease is not affected by the rule against perpetuities: see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1039.

12 See eg *West Country Cleaners (Falmouth) Ltd v Saly* [1966] 3 All ER 210, [1966] 1 WLR 1485, CA; *Hare v Nicoll* [1966] 2 QB 130, [1966] 1 All ER 285, CA; cf *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, [1977] 2 All ER 62, HL. See further LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 136.

13 *Kennewell v Dye* [1949] Ch 517, [1949] 1 All ER 881; and see generally EXECUTORS AND ADMINISTRATORS.

14 *Kennewell v Dye* [1949] Ch 517, [1949] 1 All ER 881, following *Harwood and Bincks v Hilliard* (1677) 2 Mod Rep 268.

15 *Kennewell v Dye* [1949] Ch 517, [1949] 1 All ER 881; *Skelton v Younghouse* [1942] AC 571, [1942] 1 All ER 650, HL; *Re Zerny's Will Trusts*, *Symons v Zerny* [1968] Ch 415, [1968] 1 All ER 686, CA.

16 *Re Avarad*, *Hook v Parker* [1948] Ch 43, [1947] 2 All ER 548, where a notice exercising an option out of time through no fault of the personal representatives was held to be void.

17 *Raffety v Schofield* [1897] 1 Ch 937; *Cockwell v Romford Sanitary Steam Laundry Ltd* [1939] 4 All ER 370, CA.

18 *Doe d Gray v Stanion* (1836) 1 M & W 695; *Leek and Moorlands Building Society v Clark* [1952] 2 QB 788, [1952] 2 All ER 492, CA; *Nightingale v Courtney* [1954] 1 QB 399, [1954] 1 All ER 362, CA. See also LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 136, 636. In general, termination of the lease will be inferred only from the date when the landlord shows a good title, ie as from the date that interest becomes payable under the contract of sale: see PARAS 122, 127 post.

19 *Welchman v Spinks* (1861) 5 LT 385. As to the position of vendor and purchaser under an open contract see PARA 76 post. It will usually be implied that on the exercise of the option the property is to be conveyed free from incumbrances created after the date of the option: see *Re Crosby's Contract*, *Crosby v Houghton* [1949] 1 All ER 830; cf *Fowler v Willis* [1922] 2 Ch 514, where the purchaser was not entitled to the discharge of a mortgage affecting the property at the date of the option. However, this decision seems open to criticism on its facts, since the vendor did not disclose the mortgage until after the date of the option. As to the duty of disclosure see PARA 55 post.

20 *George Wimpey & Co Ltd v IRC* [1975] 2 All ER 45, [1975] 1 WLR 995, CA; and see PARAS 318-319 post; STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1027.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### 27 Option to purchase

NOTE 9--Land Registration Act 1925 repealed and replaced by the Land Registration Act 2002; see LAND REGISTRATION.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (3) FORMATION OF THE CONTRACT/(i) Requirements for the Existence of the Contract/28. Right of pre-emption.

### 28. Right of pre-emption.

An option to purchase must be distinguished from a right of pre-emption, otherwise known as a right of first refusal. A right of pre-emption arises where the owner of land contracts that, if he decides to sell the land, he will first offer it to the other contracting party in preference to any other purchaser. It differs from an option in that it is not an offer to sell, and in itself it imposes no obligation on the owner to sell. He may do so or not as he wishes; but if he does decide to sell, then the holder of the right of pre-emption has the right to receive the first offer, which he also may accept or not as he wishes<sup>1</sup>. It is not yet clear beyond doubt whether a right of pre-emption creates an interest in land or is merely enforceable contractually<sup>2</sup>. On the basis that an interest in land is created, the right is registrable in the same way as an option<sup>3</sup>, but registration does not create any priority over subsequent interests which do not make the right of pre-emption exercisable<sup>4</sup>. On the same basis, the right would appear to fall within the statutory provisions relating to a contract in writing<sup>5</sup>. In both its contractual and its proprietary aspects it would appear that the right is subject to the rule against perpetuities<sup>6</sup>.

1 This statement is based on *Mackay v Wilson* (1947) 47 SR NSW 315 at 325 per Street J; cited with approval in *Pritchard v Briggs* [1980] Ch 338 at 389, [1980] 1 All ER 294 at 305, CA, per Goff LJ. Since the obligation is merely to offer first refusal, a right of pre-emption 'at a figure to be agreed upon' is not void for uncertainty: *Smith v Morgan* [1971] 2 All ER 1500, [1971] 1 WLR 803. It is a question of construction of the particular contract whether an option or a right of pre-emption has been created: see eg *Woodroffe v Box* [1954] ALR 474, 28 ALJ 90, Aust HC, where a right called in the contract a 'first refusal' was construed as creating an option. A particular contract may create both rights: see *Du Sautoy v Symes* [1967] Ch 1146, [1967] 1 All ER 25, where a right of pre-emption had lapsed through non-exercise, but the option was still subsisting; *Gardner v Coutts & Co* [1967] 3 All ER 1064, [1968] 1 WLR 173, where a right of pre-emption during the owner's lifetime, coupled with an option exercisable at the owner's death, impliedly precluded the owner from giving away the land without first offering it to the other contracting party. See also *Miller v Lakefield Estates Ltd* (1988) 57 P & CR 104, Times, 16 May, CA (court will not necessarily imply a term that the sale was to be for a reasonable or market price). As to whether purchasers are entitled to withdraw an offer to resell before the expiry of an acceptance period see *Tuck v Baker* [1990] 2 EGLR 195, [1990] 32 EG 46, CA. See further CONTRACT vol 9(1) (Reissue) PARA 641.

2 The contractual effect is that the owner, having put the land on the market at a certain price, must first offer to sell to the other contracting party at that price, and, having received a refusal, the owner cannot then sell to another person at a lower price: *Manchester Ship Canal Co v Manchester Racecourse Co* [1901] 2 Ch 37, CA; *Ryan v Thomas* (1911) 55 Sol Jo 364. See also *Gardner v Coutts & Co* [1967] 3 All ER 1064, [1968] 1 WLR 173. A majority of the Court of Appeal (Templeman and Stephenson LJ, Goff LJ dissenting) have expressed obiter the view that an interest in land is created but has priority only from the date when the right becomes exercisable: *Pritchard v Briggs* [1980] Ch 338, [1980] 1 All ER 294, CA; followed in *Kling v Keston Properties Ltd* (1983) 49 P & CR 212, (1984) 81 LS Gaz R 1683; cf *Manchester Ship Canal Co v Manchester Racecourse Co* supra; *Murray v Two Strokes Ltd* [1973] 3 All ER 357, [1973] 1 WLR 823; *Imperial Chemical Industries Ltd v Sussman* (28 May 1976, unreported); and see *London and Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1993] 4 All ER 157, [1994] 1 WLR 31, CA; *Homsy v Murphy* (1996) 73 P & CR 26, CA; HWRW 'Rights of Pre-emption: Interests in Land?' (1980) 96 LQR 488. As to the contrary view of the Commonwealth courts see *Mackay v Wilson* (1947) 47 SR NSW 315; *Canadian Long Island Petroleum Ltd v Irving Industries (Irving Wire Products Division) Ltd* [1975] SCR 715, 50 DLR (3d) 265, Can SC; *Re Essex County Roman Catholic Separate School Board and Antaya* (1977) 17 OR (2d) 307, 80 DLR (3d) 405.

3 See the Land Charges Act 1972 s 2(4) (as amended), Class C(iv); and LAND CHARGES vol 26 (2004 Reissue) PARAS 628, 632. As to the registration of an option see PARA 27 note 9 ante. A right of pre-emption granted to a local authority by the purchaser of a house under the Housing Act 1985 ss 32 (as amended), 33 (see HOUSING vol 22 (2006 Reissue) PARA 306) is an interest in land and therefore registrable: *First National Securities Ltd v Chiltern District Council* [1975] 2 All ER 766, [1975] 1 WLR 1075. Such a right of pre-emption binds the purchaser and his successors in title (see the Housing Act 1985 s 33(4); and HOUSING (2006 Reissue) PARA 306), and it would appear that the right has priority to all subsequent interests; but cf *Pritchard v Briggs* [1980] Ch 338, [1980] 1 All ER 294, CA.

4 *Pritchard v Briggs* [1980] Ch 338, [1980] 1 All ER 294, CA. Statutory rights of pre-emption derive their force and priority from the statute: *First National Securities Ltd v Chiltern District Council* [1975] 2 All ER 766, [1975] 1 WLR 1075.

5 In the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended) (see PARA 29 post): see *Birmingham Canal Co v Cartwright* (1879) 11 ChD 421. See further PARAS 29-40 post.

6 See the Perpetuities and Accumulations Act 1964 ss 9, 10; and PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARAS 1037-1039. Cf however, PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1038 (rights of pre-

emption and repurchase). See s 9(2) proviso, which excepts certain statutory rights of pre-emption, thus implying that other rights are within the rule: see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1037.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### 28 Right of pre-emption

NOTE 2--See also *Bircham & Co Nominees (No 2) Ltd v Worrell Holdings Ltd* [2001] EWCA Civ 775, (2001) 82 P & CR 427 (pre-emption clause that allows lessee to withdraw offer for sale at any time before acceptance does not create any interest in land, at least where lessee no longer wishes to dispose of lease).

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (3) FORMATION OF THE CONTRACT/(ii) The Requirement of a Written Contract/29. Contracts required to be in writing.

## (ii) The Requirement of a Written Contract

### 29. Contracts required to be in writing.

A contract for the sale or other disposition<sup>1</sup> of an interest in land<sup>2</sup> can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each document<sup>3</sup>. The terms may be incorporated in a document either by being set out in it or by reference to some other document<sup>4</sup>. The document incorporating the terms or, where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one), must be signed by or on behalf of each party to the contract<sup>5</sup>. Where such a contract satisfies these conditions by reason only of the rectification of one or more documents in pursuance of an order of a court, the contract comes into being, or is deemed to come into being, at such time as is specified in the order<sup>6</sup>.

These provisions do not apply in relation to a contract to grant a short lease<sup>7</sup>, a contract made in the course of a public auction, or a contract regulated under the Financial Services Act 1986<sup>8</sup>; nor do they affect the creation or operation of resulting, implied or constructive trusts<sup>9</sup>.

A contract which fails to satisfy the requirement of writing is invalid, and it follows that the intended contract must be set up as a defence to actions in tort which the intended contract would have authorised, and that any deposit, or other money, or indeed any other property, paid or transferred under the intended contract can be recovered back<sup>10</sup>.

An oral contract made between two joint tenants for the sale of the beneficial interest of one to the other will sever the beneficial joint tenancy<sup>11</sup>.

1 'Disposition' includes a conveyance and also a devise, bequest, or an appointment of property contained in a will: Law of Property Act 1925 s 205(1)(ii); definition applied by the Law of Property (Miscellaneous Provisions) Act 1989 s 2(6).

2 For the meaning of 'interest in land' see PARA 31 post.

3 Law of Property (Miscellaneous Provisions) Act 1989 s 2(1). See *Take Harvest Ltd v Liu* [1993] AC 552, [1993] 2 All ER 459, PC; *Commission for the New Towns v Cooper (GB) Ltd* [1995] Ch 259, [1995] 2 All ER 929, CA (exchange of letters regarding grant of put option enjoyed by grantee's predecessor not constituting an exchange of contracts for the purposes of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended)); *Firstpost Homes Ltd v Johnson* [1995] 4 All ER 355, [1995] 1 WLR 1567, CA (a letter purporting to constitute a contract for the sale of land which contained a reference to the plan enclosed with it was a separate document from the plan itself, so the purchaser's signature on the plan alone did not suffice to create a contract).

Nothing in the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended) applies in relation to contracts made before 27 September 1989: s 2(7). Section 2 (as amended) supersedes the Law of Property Act 1925 s 40 (repealed): see the Law of Property (Miscellaneous Provisions) Act 1989 s 2(8). The policy of s 2 (as amended) is to avoid the possibility that one or other party may wish to go behind the written document and introduce oral evidence to establish the terms of the contract. Decisions of the courts based on the Statute of Frauds Act 1677 (repealed) or the Law of Property Act 1925 s 40 (repealed) will in some instances be relevant to the present law, but not where they conflict with the policy of the present law: see *Firstpost Homes Ltd v Johnson* [1995] 4 All ER 355 at 362-363, [1995] 1 WLR 1567 at 1574-1576 per Peter Gibson and Balcombe LJ.

4 Law of Property (Miscellaneous Provisions) Act 1989 s 2(2). A collateral contract between the parties independent of the contract for sale falls outside the provisions of s 2 (as amended): see *Record v Bell* [1991] 4 All ER 471, [1991] 1 WLR 853; *Tootal Clothing Ltd v Guinea Properties Ltd* (1992) 64 P & CR 452, CA (sub nom *Tootal Clothing v Guinea Properties Management* [1992] 2 EGLR 80, CA). Agreements not to consider further offers for a fixed period (a 'lock-out agreement') also fall outside the provisions of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended): *Pitt v PHH Asset Management Ltd* [1993] 4 All ER 961, [1994] 1 WLR 327, CA. When such a 'lock-out' or exclusivity agreement is breached, damages will be the appropriate remedy: *Tye v House and Jennings* (1998) 76 P & CR 188.

5 Law of Property (Miscellaneous Provisions) Act 1989 s 2(3). Each party to the contract must write his name on the document in his own handwriting; typed or printed names are insufficient: *Firstpost Homes Ltd v Johnson* [1995] 4 All ER 355, [1995] 1 WLR 1567, CA.

6 Law of Property (Miscellaneous Provisions) Act 1989 s 2(4). For examples of such rectification see *Wright v Robert Leonard Developments Ltd* [1994] NPC 49, [1994] EGCS 69, CA; and *Commission for the New Towns v Cooper (GB) Ltd* [1995] Ch 259, [1995] 2 All ER 929, CA.

7 The lease as is mentioned in the Law of Property Act 1925 s 54(2): see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 101. See also *Long v Tower Hamlets London Borough Council* [1998] Ch 197, [1996] 2 All ER 683. The Law of Property Act 1925 s 54(2) applies to the creation of a short lease, not its assignment: see *Crago v Julian* [1992] 1 All ER 744, [1992] 1 WLR 372, CA (it follows that a contract for the assignment of a short lease is required to be in writing); and *Botting v Martin* (1808) 1 Camp 317; *Poultney v Holmes* (1720) 1 Stra 405; *Barrett v Rolph* (1845) 14 M & W 348.

8 Law of Property (Miscellaneous Provisions) Act 1989 s 2(5)(a)-(c).

9 Ibid s 2(5).

10 Cf *Thomas v Brown* (1876) 1 QBD 714; *Monnickendam v Leanse* (1923) 39 TLR 445; *Jones v Jones* (1840) 6 M & W 84; *Low v Fry* (1935) 152 LT 585 (all decided under previous legislation).

11 See *Burgess v Rawnsley* [1975] Ch 429, [1975] 3 All ER 142, CA (decided under previous legislation).

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### 29 Contracts required to be in writing

NOTE 1--A contract of disposition, as distinct from an executory contract for disposition, of an interest in land need not be in writing: *Target Holdings Ltd v Priestly* [2000] 79 P & CR 305.

NOTE 3--The Statute of Frauds Act 1677 s 4 has not been repealed. Section 4 (no action on a third party's promise unless in writing and signed) does not apply (if it would otherwise do so) in relation to a financial collateral arrangement: Financial Collateral Arrangements (No 2) Regulations 2003, SI 2003/3226.

See *Grossman v Hooper* [2001] EWCA Civ 615, [2001] 3 FCR 662 (agreement relating to discharge of loan omitted from contract for sale of land was not condition of sale; contract of sale enforceable). An oral compromise agreement requiring a vendor to enter into a contract if a purchaser is found is not a contract for the sale or other disposition of an interest in land within the 1989 Act s 2: *Nweze v Nwoko* [2004] EWCA Civ 379, [2004] All ER (D) 528 (Mar). See also *Northern Eastern Properties v Coleman* [2010] EWCA Civ 277, [2010] All ER (D) 208 (Mar).

TEXT AND NOTE 8--Now refers to a contract regulated under the Financial Services and Markets Act 2000, other than a regulated mortgage contract, a regulated home reversion plan, a regulated home purchase plan, or a regulated sale and rent back agreement: 1989 Act s 2(5)(c) (substituted by SI 2001/3649; amended by SI 2006/2383, SI 2009/1342 (with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes)). 'Regulated mortgage contract', 'regulated home reversion plan', 'regulated home purchase plan', and 'regulated sale and rent back agreement' must be read with the 2000 Act s 22, any relevant order under s 22, and Sch 22: 1989 Act s 2(6) (definition added by SI 2001/3649; amended by SI 2006/2383, SI 2009/1342 (with effect from 1 July 2009 for certain purposes and from 30 June 2010 for remaining purposes)).

TEXT AND NOTE 10--Notwithstanding the provisions of the Law of Property (Miscellaneous Provisions) Act 1989 s 2, the doctrine of proprietary estoppel may be used to give effect to an agreement for the disposition of land which is not in writing: see *Yaxley v Gotts* [2000] Ch 162, [2000] 1 All ER 711, CA; and ESTOPPEL vol 16(2) (Reissue) PARA 1094. However, in an obiter statement in *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55, [2008] 4 All ER 713, without direct reference to *Yaxley*, Lord Scott opined that the failure to provide an express exception in the Law of Property (Miscellaneous Provisions) Act 1989 s 2 for proprietary estoppel, where such an exception existed for constructive trusts, meant that the doctrine could not be so used. *Yeoman's Row* was applied without reference to *Yaxley* in *Hutchison v B & DF Ltd* [2008] EWHC 2286 (Ch), [2008] All ER (D) 41 (Oct), and the discrepancy between *Yaxley* and *Yeoman's Row* was considered in *Brightlingsea Haven Ltd v Morris* [2008] EWHC 1928 (QB), [2009] P & CR 169, [2008] All ER (D) 307 (Oct).

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### **30. Transactions to which the requirement of writing applies.**

The requirement for contracts to be in writing<sup>1</sup> has been held to apply to: (1) a contract to sell or dispose of an interest in land<sup>2</sup> where neither of the contracting parties owns such an interest at the time when the contract is made<sup>3</sup>; (2) a contract granting an option over land<sup>4</sup> (but does not apply to a notice by the purchaser exercising an option to purchase, which then creates a full contract of sale<sup>5</sup>); (3) a contract to surrender a lease for<sup>6</sup> and the creation of an equitable

mortgage<sup>7</sup>; (4) contracts concerning land which are incidental to contracts to sell or dispose of an interest in land: for example, an agreement between two persons that, in consideration of one party not competing with the other to purchase a piece of land, the other will transfer to him a part of the land<sup>8</sup>; an agreement between mortgagor and mortgagee that foreclosure proceedings will be brought, the land sold and the proceeds divided between the parties<sup>9</sup>; a submission to arbitration of a dispute relating to land<sup>10</sup>; a relinquishment of possession by a tenant in consideration of a payment towards repairs to the property<sup>11</sup>; an agreement by which the intending vendor of land promises that he will enter into a formal contract of sale, on terms orally agreed, if the purchaser tenders on a certain date his part of the contract on the agreed terms and produces a banker's draft for the agreed deposit<sup>12</sup>; and an agreement made between husband and wife to compromise a maintenance dispute, having as one of its terms a promise to transfer the matrimonial home<sup>13</sup>.

On the other hand, the requirement for contracts to be in writing has been held not to apply to: (a) an agreement not to consider further offers for a fixed period (a lock-out agreement)<sup>14</sup>; (b) a collateral contract which is independent of the contract of sale<sup>15</sup>; (c) an agreement as to the purchase price on a compulsory purchase<sup>16</sup>; (d) an agreement to discharge a debt conditional on the transfer of certain land to the creditor<sup>17</sup>.

The requirement of writing applies only to an executory contract and not to a contract which has been completed by the execution of the relevant disposition<sup>18</sup>.

1 The provision is now contained in the Law of Property (Miscellaneous Provisions) Act 1989 s 2(1); see PARA 29 ante.

2 For the meaning of 'interest in land' see PARA 31 post.

3 *Singh v Beggs* (1995) 71 P & CR 120.

4 See *Spiro v Glencrown Properties Ltd* [1991] Ch 537, [1991] 1 All ER 600; *Take Harvest Ltd v Liu* [1993] AC 552, [1993] 2 All ER 459, PC; and *Commission for the New Towns v Cooper (GB) Ltd* [1995] Ch 259, [1995] 2 All ER 929, CA.

5 *Spiro v Glencrown Properties Ltd* [1991] Ch 537, [1991] 1 All ER 600; *Trustees of Chippenham Golf Club v North Wiltshire District Council* (1991) 64 P & CR 527 at 530-531 per Scott LJ. Similarly, where an option to purchase is registered, further registration of the contract of sale envisaged by the option is not required to protect the holder of the option as it would add nothing to the protection already afforded him by registration of the option: see *Armstrong & Holmes Ltd v Holmes* [1994] 1 All ER 826, [1993] 1 WLR 1482.

6 See *Smart v Harding* (1855) 15 CB 652 (decided under previous legislation).

7 See *United Bank of Kuwait plc v Sahib* [1997] Ch 107, [1996] 3 All ER 215, CA.

8 See *Lamas v Bayly* (178) 2 Vern 627 (decided under previous legislation). As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

9 See *Cox v Peele* (1788) 2 Bro CC 334 (decided under previous legislation).

10 See *Rainforth v Hamer* (1855) 25 LTOS 247 (decided under previous legislation).

11 See *Buttemere v Hayes* (1839) 5 M & W 456 (decided under previous legislation). See also *Griffith v Young* (1810) 12 East 513; *Smith v Tombs* (1839) 3 Jur 72; *Cocking v Ward* (1845) 1 CB 858; *Kelly v Webster* (1852) 12 CB 283; *Smart v Harding* (1855) 15 CB 652; *Green v Saddington* (1857) 7 E & B 503; *Hodgson v Johnson* (1858) EB & E 685; *Lavery v Turley* (1860) 6 H & N 239; and *Horsev v Graham* (1869) LR 5 CP 9 (all decided under previous legislation).

12 See *Daulia Ltd v Four Millbank Nominees Ltd* [1978] Ch 231, [1978] 2 All ER 557, CA (decided under previous legislation).

13 See *Steadman v Steadman* [1976] AC 536, [1974] 2 All ER 977, HL (decided under previous legislation).

14 See *Pitt v PHH Asset Management Ltd* [1993] 4 All ER 961, [1994] 1 WLR 327, CA.



15 See *Record v Bell* [1991] 4 All ER 471, [1991] 1 WLR 853; *Tootal Clothing Ltd v Guinea Properties Ltd* (1992) 64 P & CR 452, CA, sub nom *Tootal Clothing v Guinea Properties Management* [1992] 2 EGLR 80, CA.

16 Such an agreement is not an ordinary contract but a statutory contract which is not within the provision: see *Munton v Greater London Council* [1976] 2 All ER 815 at 818, [1976] 1 WLR 649 at 653, CA, per Lord Denning MR (decided under previous legislation).

17 See *Simpson v Connolly* [1953] 2 All ER 474, [1953] 1 WLR 911 (decided under previous legislation).

18 See *Tootal Clothing Ltd v Guinea Properties Ltd* (1992) 64 P & CR 452, CA, sub nom *Tootal Clothing v Guinea Properties Management* [1992] 2 EGLR 80, CA.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (3) FORMATION OF THE CONTRACT/(ii) The Requirement of a Written Contract/31. Meaning of 'an interest in land'.

#### 31. Meaning of 'an interest in land'.

The expression 'an interest in land' in the statutory provision requiring writing<sup>1</sup> comprises all proprietary interests in land, whether legal or equitable. 'Interest in land' means any estate, interest or charge in or over land<sup>2</sup>.

The following have been held to fall within the provision requiring writing: an agreement to assign a lease, even an informal lease, such as a yearly tenancy<sup>3</sup>; an agreement to create an easement<sup>4</sup>; an agreement to grant a right of shooting and taking away part of the game killed<sup>5</sup>; an agreement to charge rent due under a lease<sup>6</sup>; the creation by debenture of a floating charge comprising land<sup>7</sup>; an agreement relating to fixtures<sup>8</sup>, except tenant's fixtures removable during the term<sup>9</sup>; an agreement for the sale and removal of building materials on the demolition of a house, with a time limit for removal<sup>10</sup>; the creation of an option to purchase<sup>11</sup> and a right of pre-emption<sup>12</sup>; an agreement to assign a share in a partnership in land<sup>13</sup>; and an agreement for the sale of the beneficial interest of a co-owner<sup>14</sup>.

A sale of growing crops, including timber, where the intention of the parties is that property is to pass before they are severed from the land, is a sale of land within the statutory provision<sup>15</sup> unless the crops are *fructus industriales*, that is, not the spontaneous produce of the land but produced with human labour<sup>16</sup>. Where the intention is that property is not to pass until severance from the land, there is a sale of goods not within the provision<sup>17</sup>; such an intention may be shown by an agreement that the vendor is to cut the crops and deliver them to the purchaser<sup>18</sup>, and by an agreement that the purchaser is to fell the trees and remove them as soon as possible<sup>19</sup>.

A contractual licence to occupy land does not create a proprietary interest and therefore does not fall within the provision<sup>20</sup>.

<sup>1</sup> The provision is now contained in the Law of Property (Miscellaneous Provisions) Act 1989 s 2(1); see PARA 29 ante.

2 Ibid s 2(6) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4). 'Land' is not defined by the Law of Property (Miscellaneous Provisions) Act 1989. For the meaning of land see the Interpretation Act 1978 s 5, Sch 1; and REAL PROPERTY vol 39(2) (Reissue) PARA 76.

3 *Botting v Martin* (1808) 1 Camp 317 (decided under previous legislation). The provision also applies where the residue of the term to be assigned is less than three years: *Poultney v Holmes* (1720) 1 Stra 405; *Barrett v Rolph* (1845) 14 M & W 348 (both decided under previous legislation). Cf *Crago v Julian* [1992] 1 All ER 744, [1992] 1 WLR 372, CA.

4 *Hoare & Co Ltd v Lewisham Corp*n (1901) 85 LT 281; affd (1902) 87 LT 464, CA (decided under previous legislation). See also *McManus v Cooke* (1887) 35 ChD 681 (decided under previous legislation).

5 *Webber v Lee* (1882) 9 QBD 315; *Mason v Clarke* [1955] AC 778, [1955] 1 All ER 914, HL (both decided under previous legislation).

6 *Re Whitting, ex p Hall* (1879) 10 ChD 615, CA (decided under previous legislation).

7 *Driver v Broad* [1893] 1 QB 744, CA (decided under previous legislation).

8 *Jarvis v Jarvis* (1893) 63 LJ Ch 10; *Morgan v Russell & Sons* [1909] 1 KB 357, DC (both decided under previous legislation).

9 *Lee v Gaskell* (1876) 1 QBD 700; *Thomas v Jennings* (1896) 66 LJQB 5 (both decided under previous legislation).

10 *Lavery v Pursell* (1888) 39 ChD 508 (decided under previous legislation). A contract to build a house is not within the provision (*Wright v Stavert* (1860) 2 E & E 721 at 728 per Hill J (decided under previous legislation)); nor is a contract to build a road (*Jameson v Kinnell Bay Land Co Ltd* (1931) 47 TLR 593, CA (decided under previous legislation)).

11 *Birmingham Canal Co v Cartwright* (1879) 11 ChD 421 at 434 per Fry J (decided under previous legislation).

12 *Birmingham Canal Co v Cartwright* (1879) 11 ChD 421; *Pritchard v Briggs* [1980] Ch 338 at 369, [1978] 1 All ER 886 at 905 per Walton J; revsd on another point [1980] Ch 338 at 374, [1980] 1 All ER 294, CA (both decided under previous legislation).

13 *Gray v Smith* (1889) 43 ChD 208 (on appeal (1889) 43 ChD 217, CA); see also *Caddick v Skidmore* (1857) 2 De G & J 52; cf *Forster v Hale* (1800) 5 Ves 308 (all decided under previous legislation).

14 As to the abolition of the equitable doctrine of conversion see the Trusts of Land and Appointment of Trustees Act 1996 s 3; and TRUSTS vol 48 (2007 Reissue) PARAS 966-967.

As to the law prior to 1997 see *Cooper v Critchley* [1955] Ch 431 at 439, [1955] 1 All ER 520 at 524, CA, obiter per Jenkins LJ, at 440 and 525 obiter per Evershed MR; *Liddell v Hopkinson* (1974) 233 Estates Gazette 513; *Steadman v Steadman* [1974] QB 161, [1973] 3 All ER 977, CA (affd [1976] AC 536, [1974] 2 All ER 977, HL); *McDonald v Windaybank* (1975) 120 Sol Jo 96. See also *Burgess v Rawnsley* [1975] Ch 429, [1975] 3 All ER 142, CA.

15 *Waddington v Bristow* (1801) 2 Bos & P 452; *Crosby v Wadsworth* (1805) 6 East 602; *Emmerson v Heelis* (1809) 2 Taunt 38 (but see note 16 infra); *Teal v Auty and Dibb* (1820) 2 Brod & Bing 99; *Scorell v Boxall* (1827) 1 Y & J 396; *Earl of Falmouth v Thomas* (1832) 1 Cr & M 89; *Carrington v Roots* (1837) 2 M & W 248; *Rodwell v Phillips* (1842) 9 M & W 501 (all decided under previous legislation).

16 *Parker v Staniland* (1809) 11 East 362 (potatoes); *Warwick v Bruce* (1813) 2 M & S 205 (potatoes); *Mayfield v Wadsley* (1824) 3 B & C 357 (wheat); *Evans v Roberts* (1826) 5 B & C 829 (potatoes); *Sainsbury (or Stansbury) v Matthews* (1838) 4 M & W 343 (potatoes); *Jones v Flint* (1839) 10 Ad & El 753 (wheat, barley and potatoes) (all decided under previous legislation). Cf *Emmerson v Heelis* (1809) 2 Taunt 38, where a sale of growing turnips was held to be a sale of an interest in land, although the decision was doubted in *Evans v Roberts* supra, and *Jones v Flint* supra (all decided under previous legislation).

17 *Smith v Surman* (1829) 9 B & C 561; *Washbourn v Burrows* (1847) 1 Exch 107; *Marshall v Green* (1875) 1 CPD 35 (all decided under previous legislation). The statement in the text is based on the proposition that the wide definition of 'goods' in the Sale of Goods Act 1979 s 61 (as amended) (see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 30) cannot have affected the earlier authorities on the Statute of Frauds (1677) (which should apply in the context of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended) (see PARA 29 ante): see Hudson 'Goods or Land?' (1958) 22 Conv (NS) 137. In *Lowe v JW Ashmore Ltd*

[1971] Ch 545, [1971] 1 All ER 1057, an informal contract for the sale of turves was regarded as a contract for sale of goods.

18 *Washbourn v Burrows* (1847) 1 Exch 107 (decided under previous legislation).

19 *Marshall v Green* (1875) 1 CPD 35, DC (decided under previous legislation).

20 See *Ashburn Anstalt v Arnold* [1989] Ch 1, [1988] 2 All ER 147, CA (rejecting previous authority to the contrary). As to the distinction between a licence to occupy and a lease see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 6-16.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### 31 Meaning of 'an interest in land'

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (3) FORMATION OF THE CONTRACT/(ii) The Requirement of a Written Contract/32. Contracts partly within the provision requiring writing.

### 32. Contracts partly within the provision requiring writing.

Where an agreement is in part for a transaction in land and in part for some other purpose, the question arises whether there is one entire agreement or whether the agreement is divisible. In the former case, the whole contract will fail unless it is in writing<sup>1</sup>, whereas in the latter case only that part of the agreement relating to land will fail. The question whether a transaction amounts to one entire contract or is severable into parts depends upon the circumstances of each case<sup>2</sup>.

The following contracts have been held to be entire: a promise to pay rent due and to accrue within a certain time, in consideration of a forbearance to distrain<sup>3</sup>; an agreement for the sale of land and chattels<sup>4</sup>; an agreement for a lease with plant to be taken at a valuation<sup>5</sup>; an agreement for a lease with crops and materials at valuation<sup>6</sup>; an agreement for the sale of land with goodwill and stock in trade<sup>7</sup>; an agreement in writing to sell certain land, subsequently extended orally to include additional land<sup>8</sup>; an agreement to let a furnished house with a promise to provide additional furniture<sup>9</sup>; an agreement for the surrender of a lease and the grant of a new lease, with an agreement for a yearly tenancy pending the grant of the new lease<sup>10</sup>; an agreement for the assignment of a tenancy with an undertaking by the assignee to pay the rent and keep the premises in repair<sup>11</sup>; and an agreement for the sale of land with a provision for set-off against the purchase price<sup>12</sup>.

The following contracts have been held to be divisible: an agreement for payment for wheat and dead stock divisible from an agreement to give up possession of land<sup>13</sup>; an agreement for the sale of land and a provision for set-off against the purchase price<sup>14</sup>; a landlord's promise to

keep down game, which induced the tenant to sign a lease<sup>15</sup>; a landlord's oral warranty that drains were in order, inducing the tenant to sign the lease<sup>16</sup>; a landlord's promise to effect repairs and supply additional furniture within a reasonable time after the tenant's entry, which induced the tenant to sign the lease<sup>17</sup>; an agreement between A and B that if A will purchase certain land from C, B will reimburse to A the amount of the purchase price<sup>18</sup>.

Some of the above examples of divisible contracts may also be regarded as cases where the divisible part amounted to a contract collateral to the main agreement<sup>19</sup>. For example, a landlord's oral promise that the drains are in order, inducing the tenant to enter into the lease, may be regarded as a contract collateral to the lease; oral evidence may therefore be given to prove it, and the contract is not within the statutory provision requiring writing<sup>20</sup>. Similarly, where the vendor's letter was an offer of warranty by the vendor's solicitor<sup>21</sup> to the purchaser's solicitor as to the state of the title to induce him to exchange and that offer had been accepted by exchanging contracts, there existed a collateral contract, and it was therefore irrelevant that the warranty was not contained in the contracts which the parties exchanged<sup>22</sup>.

1 See now the Law of Property (Miscellaneous Provisions) Act 1989 s 2(1); and PARA 29 ante.

2 *Bigg v Whisking* (1853) 14 CB 195 (decided under previous legislation).

3 *Thomas v Williams* (1830) 10 B & C 664 (decided under previous legislation).

4 *Cooke v Tombs* (1794) 2 Anst 420; *Lea v Barber* (1794) 2 Anst 425n (both decided under previous legislation).

5 *Hodgson v Johnson* (1858) EB & E 685; doubted in *Pulbrook v Lawes* (1876) 1 QBD 284, DC (both decided under previous legislation).

6 *Earl of Falmouth v Thomas* (1832) 1 Cr & M 89 (decided under previous legislation).

7 *Hawkesworth v Turner* (1930) 46 TLR 389; *Ram Narayan v Rishad Hussain Shah* [1979] 1 WLR 1349, PC (agreement for sale of leasehold farms with livestock and equipment) (both decided under previous legislation).

8 *Bellaney v Knight* (1862) 5 LT 785 (decided under previous legislation).

9 *Mechelen v Wallace* (1837) 7 Ad & El 49; *Vaughan v Hancock* (1846) 3 CB 766; but cf *Angell v Duke* (1875) LR 10 QB 174, where the tenant was induced to agree to the letting by the landlord's promise to effect repairs and supply additional furniture within a reasonable time after entry, and the latter promise was held to be divisible and enforceable without writing (all decided under previous legislation).

10 *Foquet v Moor* (1852) 7 Exch 870 (decided under previous legislation).

11 *Bentham v Hardy* (1843) 6 ILR 179 (decided under previous legislation).

12 *Savage v Canning* (1867) 16 WR 133; cf *Archer v Hall* (1859) 7 WR 222, where the contrary conclusion was reached (both decided under previous legislation).

13 *Mayfield v Wadsley* (1824) 3 B & C 357 (decided under previous legislation).

14 *Archer v Hall* (1859) 7 WR 222; cf *Savage v Canning* (1867) 16 WR 133, cited in note 12 supra (both decided under previous legislation).

15 *Morgan v Griffith* (1871) LR 6 Exch 70 (decided under previous legislation).

16 *De Lassalle v Guildford* [1901] 2 KB 215, CA (decided under previous legislation).

17 *Angell v Duke* (1875) LR 10 QB 174 (decided under previous legislation).

18 *Boston v Boston* [1904] 1 KB 124, CA (decided under previous legislation). See also *Re Banks, Weldon v Banks* (1912) 56 Sol Jo 362 (decided under previous legislation).

19 See generally CONTRACT vol 9(1) (Reissue) PARA 753.

20 *De Lassalle v Guildford* [1901] 2 KB 215, CA (decided under previous legislation). For an example of the use of the collateral contract device in avoiding the oral evidence rule see *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129, [1958] 2 All ER 733 (decided under previous legislation). It must, of course, be proved that the promise sued upon was intended to have contractual effect, and was not merely a representation inducing the main contract: *Wells (Merstham) Ltd v Buckland Sand and Silica Ltd* [1965] 2 QB 170, [1964] 1 All ER 41 (decided under previous legislation).

21 See PARA 3 ante.

22 *Record v Bell* [1991] 4 All ER 471, [1991] 1 WLR 853. 'It would be unfortunate if common transactions of this nature should nevertheless cause the contracts to be avoided. It may, of course, lead to a greater use of the concept of collateral warranties than has hitherto been necessary': *Record v Bell* supra at 479 and 862 per Judge Paul Baker QC. See also *Tootal Clothing Ltd v Guinea Properties Ltd* (1992) 64 P & CR 452, CA, sub nom *Tootal Clothing v Guinea Properties Management* [1992] 2 EGLR 80, CA.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### 32 Contracts partly within the provision requiring writing

NOTE 14--See also *Mirza v Mirza* [2009] EWHC 3 (Ch), [2009] 2 FCR 12 (agreement for sale and loan; loan provisions separable and enforceable).

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (3) FORMATION OF THE CONTRACT/(ii) The Requirement of a Written Contract/33. The requirement of a signed document.

### 33. The requirement of a signed document.

The document for the sale of land<sup>1</sup> incorporating all the terms which the parties have expressly agreed, or where contracts are exchanged, one of the documents incorporating them (but not necessarily the same one) must be signed by or on behalf of each party<sup>2</sup>. Where the contract document incorporates another document by reference, it is essential that the parties' signatures are on the contract document<sup>3</sup>. Where a letter purported to constitute a contract for the sale of land and contained a reference to the plan enclosed with it, the letter was one document and the plan was another (the terms of which were incorporated in the letter); it was the letter and not the plan that needed to be signed. Therefore, the purchaser's signature on the plan alone did not suffice to create a contract<sup>4</sup>.

The phrase 'exchange of contracts' refers to the exchange of identical documents which the parties intend as an embodiment of their agreement<sup>5</sup>; it does not include a situation where the parties reach agreement by an exchange of correspondence containing an offer and acceptance<sup>6</sup>.

The word 'signed' is to be given its ordinary meaning, and it means 'the document being signed by or on behalf of each party obviously so as to authenticate the document'<sup>7</sup>. Where the purchaser's name had been typed at the top of the letter as addressee and he had not otherwise signed the letter, the signature requirement was not satisfied and no valid contract existed<sup>8</sup>.

Where a written contract for the sale of land is subsequently varied, for example where the date for completion is altered, the contract as varied must comply with the statutory requirement, so that it is in writing and incorporated in one document (or each document if contracts were exchanged), and signed by or on behalf of each party to the contract<sup>9</sup>. Presumably it is sufficient to incorporate the original terms by reference to the previous contract<sup>10</sup>. Where the variation does not comply with the statutory requirement, the original contract remains valid and can be enforced<sup>11</sup>. If, however, the oral agreement shows that the parties intend to rescind the original contract in any event, the rescission takes effect, and neither the original nor the subsequent contract can be enforced<sup>12</sup>. A variation involving a definite alteration of the contractual obligations must be distinguished from a mere waiver or forbearance by one party, at the request of the other, to insist on performance of the strict terms of the contract<sup>13</sup>. Such a waiver or forbearance need not be in writing and oral evidence of it is admissible<sup>14</sup>.

1 As to the statutory requirement for such contracts to be in writing see the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended); and PARA 29 ante.

2 See *ibid* s 2(3); and PARA 29 ante.

3 See *ibid* s 2(2); and PARA 29 ante. The singular 'document' includes the plural, so that a contract document could incorporate terms from more than one other document: see the Interpretation Act 1987 s 6; 503 HL Official Report (5th series), 24 January 1989, col 610.

4 *Firstpost Homes Ltd v Johnson* [1995] 4 All ER 355, [1995] 1 WLR 1567, CA.

5 As to methods of exchange see PARA 23 ante.

6 *Commission for the New Towns v Cooper (GB) Ltd* [1995] Ch 259, [1995] 2 All ER 929, CA (where a plaintiff confirmed an agreement in a letter and annexed a recommendation to it, which he later confirmed the accuracy of in another letter, the two letters confirming the agreement were insufficient to satisfy the statutory requirement that contracts for the sale or disposition of an interest in land should be in writing). This decision did not follow the decision in *Hooper v Sherman* [1994] NPC 153, CA, where the exchange of correspondence recorded an oral agreement already reached: see *Commission for New Towns v Cooper (GB) Ltd* *supra* at 295 and 959 per Evans LJ.

7 *Firstpost Homes Ltd v Johnson* [1995] 4 All ER 355 at 363, [1995] 1 WLR 1567 at 1577, CA, per Balcombe LJ.

8 *Firstpost Homes Ltd v Johnson* [1995] 4 All ER 355, [1995] 1 WLR 1567, not following *Evans v Hoare* [1892] 1 QB 593, and citing with approval (Gibson and Balcombe LJ) the comments of Evershed MR and Denning LJ in *Goodman v J Eban Ltd* [1954] 1 QB 550 at 555, 561, [1954] 1 All ER 763 at 765, 768. It does not necessarily follow that a handwritten signature will be required in all circumstances: see *Firstpost Homes Ltd v Johnson* [1995] 4 All ER 355 at 362, [1995] 1 WLR 1567 at 1576 per Peter Gibson LJ; and PARA 39 post.

9 *McCausland v Duncan Lawrie Ltd* [1996] 4 All ER 995, [1997] 1 WLR 38, CA. 'The formalities prescribed by the Law of Property (Miscellaneous Provisions) Act 1989 s 2 must be observed in order to effect a variation of a term material to the contract...it does not follow that s 2 must be observed in order to secure the variation of a term which is immaterial': *McCausland v Duncan Lawrie Ltd* *supra* at 1006 and 49 per Morritt LJ.

10 See *B Ltd v T Ltd* [1991] NPC 47. See also the text and note 3 *supra*.

11 See *McCausland v Duncan Lawrie Ltd* [1996] 4 All ER 995, [1997] 1 WLR 38, CA.

12 *Morris v Baron & Co* [1918] AC 1, HL (decided under previous legislation); and see *McCausland v Duncan Lawrie Ltd* [1996] 4 All ER 995 at 1006, [1997] 1 WLR 38 at 48, CA, per Morritt LJ. As to the distinction between variation and rescission see also *GW Fisher Ltd v Eastwoods Ltd* [1936] 1 All ER 421; *United Dominions Corp'n (Jamaica) Ltd v Shoucair* [1969] 1 AC 340, [1968] 2 All ER 904, PC; *Marriott v Oxford and District Co-operative Society Ltd* [1970] 1 QB 186, [1969] 3 All ER 1126, CA (all decided under previous legislation).

13 As to the distinction between a variation and a waiver for forbearance see CONTRACT vol 9(1) (Reissue) PARAS 1019-1029; and as to whether such a waiver is binding see CONTRACT vol 9(1) (Reissue) PARA 1027.

14 See *Ogle v Earl Vane* (1868) LR 3 QB 272, Ex Ch; *Leather-Cloth Co v Hieronimus* (1875) LR 10 QB 140; *Hickman v Haynes* (1875) LR 10 CP 598; *Morris v Baron & Co* [1918] AC 1 HL; *Besseler, Waechter, Glover & Co v*

*South Derwent Coal Co Ltd* [1938] 1 KB 408, [1937] 4 All ER 552 (all decided under previous legislation); and *McCausland v Duncan Lawrie Ltd* [1996] 4 All ER 995 at 1006, [1997] 1 WLR 38 at 48, CA, per Morritt LJ. For cases where there was held to be a variation rather than a waiver see CONTRACT vol 9(1) (Reissue) PARAS 1019-1024.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### 33 The requirement of a signed document

NOTE 2--Where a contract lays down conditions under which one party could be compelled to dispose of his land, the requirements of the 1989 Act s 2 have to be complied with including the requirement for the purchaser's signature: *Jelson Ltd v Derby CC* [1999] EG 88 (CS); distinguished in *Nweze v Nwoko* [2004] EWCA Civ 379, [2004] All ER (D) 528 (Mar) (see PARA 29).

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (3) FORMATION OF THE CONTRACT/(ii) The Requirement of a Written Contract/34. The contents of the written contract.

### 34. The contents of the written contract.

In order to be sufficiently certain, the contract must: (1) define the parties and show who is the vendor and who is the purchaser (or lessor and lessee, or mortgagor and mortgagee, as the case may be)<sup>1</sup>; (2) define the property and the interest in it being disposed of, and state what kind of disposition is to be made<sup>2</sup>; and (3) show what is the consideration or how it is to be ascertained<sup>3</sup>. Where these requirements are satisfied, together with the statutory requirement of a signed document, there is a valid open contract; other terms will be implied by the law in order to give business efficacy to the contract. In particular, terms will be implied imposing an obligation on the vendor to make a good title free from incumbrances<sup>4</sup>, providing for completion within a reasonable time<sup>5</sup>, for vacant possession on completion<sup>6</sup>; and in the case of unregistered land providing for the delivery by the vendor of an abstract of title within a reasonable time<sup>7</sup>, and fixing the length of title to be deduced by the vendor<sup>8</sup>.

1 As to the identification of the parties see PARA 35 post.

2 As to the identification of the property and the interest in it see PARA 36 post.

3 As to the consideration see PARA 37 post.

4 See *Gray v Smith* (1889) 43 ChD 208 at 214 per Kekewich J (on appeal (1889) 43 ChD 217, CA); and *Johnson v Humphrey* [1946] 1 All ER 460 at 463 per Roxburgh J. The cases cited in this paragraph were all decided under legislation prior to the coming into force of the Law of Property (Miscellaneous Provisions) Act 1989: see PARA 29 note 3 ante. As to the statutory requirement for such contracts to be in writing see s 2 (as amended); and PARA 29 ante.

5 See *Green v Sevin* (1879) 13 ChD 589 at 599; *Compton v Bagley* [1892] 1 Ch 313; *Simpson v Hughes* (1897) 66 LJ Ch 334, CA; *Bond v Bassett* (1917) 87 LJ Ch 160; and *Re Bayley and Shoemith's Contract* (1918) 87 LJ Ch 626.

6 See *Cook v Taylor* [1942] Ch 349 at 354, [1942] 2 All ER 85 at 87 per Simonds J; and *Re Crosby's Contract, Crosby v Houghton* [1949] 1 All ER 830. See further PARA 123 post.

7 See *Compton v Bagley* [1892] 1 Ch 313. See further PARA 100 post. As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 post.

8 See the Law of Property Act 1925 s 44(1) (as amended); and PARA 139 post. For the provisions as between vendor and purchaser on a sale or other disposition of registered land to a purchaser see the Land Registration Act 1925 s 110; and LAND REGISTRATION.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### 34 The contents of the written contract

NOTE 8--Land Registration Act 1925 repealed and replaced by the Land Registration Act 2002; see LAND REGISTRATION.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (3) FORMATION OF THE CONTRACT/(ii) The Requirement of a Written Contract/35. Identification of the parties.

### 35. Identification of the parties.

In identifying the parties the overriding principle is that the parties must be so described that their identities cannot fairly be disputed<sup>1</sup>. If the description of a party is insufficient, oral evidence is inadmissible to show that the other party knew who he was<sup>2</sup>. In almost all cases, the requirement that the contract be signed by both parties will, of necessity, define those parties by name, but the signature in itself may not be sufficient to identify the capacity of each of the parties. Moreover, there may be exceptional circumstances, for example if the signature is by a mark, where the party signing is not identified by name. In either case the question may then arise whether some other form of identification in the contract is sufficient to satisfy the statutory requirement. It seems likely that expressions such as 'proprietor'<sup>3</sup> or 'owner'<sup>4</sup> of a specified property will continue to be regarded as adequate<sup>5</sup>. On the other hand, expressions such as 'vendor'<sup>6</sup> or 'client'<sup>7</sup> are unlikely to be considered adequate, if the party is not otherwise named or identified<sup>8</sup>.

If the contract fails to identify the vendor but is signed by the vendor's agent without mentioning the agency, then, since the agent incurs personal liability (even though the purchaser knows of the agency), the contract may be enforced against the vendor as principal<sup>9</sup>.

The description of a limited company by the wrong name does not invalidate the contract if it is clear from the surrounding circumstances or from facts known to the other party that the name in the document is merely an inaccurate description<sup>10</sup>.



1 See *Potter v Duffield* (1874) LR 18 Eq 4; *Dewar v Mintoft* [1912] 2 KB 373; *Cohen v Roche* [1927] 1 KB 169. The cases cited in this paragraph were all decided under legislation prior to the coming into force of the Law of Property (Miscellaneous Provisions) Act 1989: see PARA 29 note 3 ante. As to the statutory requirement for such contracts to be in writing see s 2 (as amended); and PARA 29 ante.

2 See *Jarrett v Hunter* (1886) 34 ChD 182. Under the law prior to the coming into force of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended) (see PARA 29 ante), evidence of surrounding circumstances was admitted to resolve an ambiguity: see *Newell v Radford* (1867) LR 3 CP 52; *Carr v Lynch* [1900] 1 Ch 613; *Stokes v Whicher* [1920] 1 Ch 411. It seems unlikely that those authorities would now be followed.

3 *Sale v Lambert* (1874) LR 18 Eq 1; *Rossiter v Miller* (1878) 3 App Cas 1124, HL; *Jarrett v Hunter* (1886) 34 ChD 182.

4 *Jarrett v Hunter* (1886) 34 ChD 182; *Butcher v Nash* (1889) 61 LT 72; *Walters v Le Blanc* (1900) 16 TLR 366, CA.

5 Under the law prior to the coming into force of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended) (see PARA 29 ante), the following expressions were also held to be adequate: 'trustee for sale' (*Catling v King* (1877) 5 ChD 660, CA; *Butcher v Nash* (1889) 61 LT 72); 'mortgagee' (*Jarrett v Hunter* (1886) 34 ChD 182; *AH Allen & Co Ltd v Whiteman* (1920) 89 LJ Ch 534); 'executors' (*Hood v Lord Barrington* (1868) LR 6 Eq 218); 'legal personal representative' (*Towle v Topham* (1877) 37 LT 308; *Fay v Miller, Wilkins & Co* [1941] Ch 360); a named vendor 'on behalf of himself and all parties interested' (*Morgan v Worthington* (1878) 38 LT 443); 'you' (*Carr v Lynch* [1900] 1 Ch 613); 'I' (*Stokes v Whicher* [1920] 1 Ch 411).

6 See *Hood v Lord Barrington* (1868) LR 6 Eq 218; *Potter v Duffield* (1874) LR 18 Eq 4; *Thomas v Brown* (1876) 1 QBD 714. Cf *Commins v Scott* (1875) LR 20 Eq 11, followed in *F Goldsmith (Sicklesmere) Ltd v Baxter* [1970] Ch 85, [1969] 3 All ER 733.

7 See *Jarrett v Hunter* (1886) 34 ChD 182; *Lovesy v Palmer* [1916] 2 Ch 233; but see *Cropper v Cook* (1868) LR 3 CP 194; and cf *AH Allen & Co Ltd v Whiteman* (1920) 89 LJ Ch 534.

8 Under the law prior to the coming into force of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended) (see PARA 29 ante), the following expressions were held to be insufficiently precise: 'friend' (*Jarrett v Hunter* (1886) 34 ChD 182); 'principal' (*Rossiter v Miller* (1878) 3 App Cas 1124, HL); 'landlord' (*Coombs v Wilkes* [1891] 3 Ch 77 (cf the interpretation of 'tenant' in *Stokell v Niven* (1889) 61 LT 18, CA)); 'proposing and intending lender' (*Pattle v Anstruther* (1893) 69 LT 175, CA).

9 *Davies v Sweet* [1962] 2 QB 300, [1962] 1 All ER 92, CA, applying *Basma v Weekes* [1950] AC 441 (sub nom *Abdual Karim Basma v Weekes* [1950] 2 All ER 146, PC). See also *Filby v Hounsell* [1896] 2 Ch 737, considered in *Lovesy v Palmer* [1916] 2 Ch 233 at 242-244 per Younger J. Quaere whether this principle still applies despite the change in the law (see PARA 29 note 3 ante), as it depends on the law of agency and does not conflict with any express provision in the Law of Property (Miscellaneous Provisions) Act 1989.

10 See *F Goldsmith (Sicklesmere) Ltd v Baxter* [1970] Ch 85, [1969] 3 All ER 733 (where the plaintiff company, the vendor, contracted in the name of *Goldsmith Coaches (Sicklesmere) Ltd*).

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (3) FORMATION OF THE CONTRACT/(ii) The Requirement of a Written Contract/36. Identification of the property and interest disposed of and the nature of the disposition.

### 36. Identification of the property and interest disposed of and the nature of the disposition.

Where the contract contains a description which renders the property ascertainable, oral evidence has been admitted to complete the identification<sup>1</sup>. 'The property' alone is insufficient<sup>2</sup>, but the following incomplete descriptions have sufficed: 'this place'<sup>3</sup>, 'property' sold to a named person at a stated auction<sup>4</sup>; 'my house'<sup>5</sup>; 'Mr Ogilvie's house'<sup>6</sup>; 'the house etc in Newport', coupled with a statement that the deeds were in the possession of a named person<sup>7</sup>; 'the intended new public house at Putney'<sup>8</sup>; '24 acres of land, freehold, and all appurtenances at Totmonslow'<sup>9</sup>; 'house being sold for £500 from' the defendant<sup>10</sup>; 'the mill property including cottages in Esher village', even though part of the property was not in Esher village<sup>11</sup>; and 'the Jolly Sailor offices'<sup>12</sup>.

It is not generally necessary for the contract to identify the interest disposed of<sup>13</sup>. Where the contract relates to freehold land, there is a presumption that the interest disposed of is the unincumbered fee simple, unless the purchaser knows that the vendor has only a lesser estate, in which case the purchaser is entitled to a transfer of the vendor's whole interest<sup>14</sup>. Where a freehold is, to the purchaser's knowledge, subject to a subsisting lease, it is not necessary for the contract to refer to the lease<sup>15</sup>. If the contract indicates that something less than the vendor's whole interest is to pass, the contract must go on to define that interest. Where there is a sale of a leasehold, the contract must state whether the lease is to be assigned or whether an underlease is to be granted<sup>16</sup>, and a contract to grant a lease must state the date of commencement and the duration of the term to be granted<sup>17</sup>.

1 See *Ogilvie v Foljambe* (1817) 3 Mer 53; *Shardlow v Cotterell* (1881) 20 ChD 90, CA; *Plant v Bourne* [1897] 2 Ch 281, CA; *Sheers v Thimbleby & Son* (1897) 76 LT 709 at 712 per Chitty J; *Auerbach v Nelson* [1919] 2 Ch 383.

2 See *Vale of Neath Colliery Co v Furness* (1876) 45 LJ Ch 276; cf *Shardlow v Cotterell* (1881) 20 ChD 90, CA.

3 See *Waldron v Jacob and Millie* (1870) IR 5 Eq 131.

4 See *Shardlow v Cotterell* (1881) 20 ChD 90, CA. See also *Bleakley v Smith* (1840) 11 Sim 150; *McMurry v Spicer* (1868) LR 5 Eq 527.

5 See *Cowley v Watts* (1853) 22 LJ Ch 591.

6 See *Ogilvie v Foljambe* (1817) 3 Mer 53.

7 See *Owen v Thomas* (1834) 3 My & K 353.

8 See *Wood v Scarth* (1855) 2 K & J 33.

9 See *Plant v Bourne* [1897] 2 Ch 281, CA.

10 See *Auerbach v Nelson* [1919] 2 Ch 383.

11 See *McMurray v Spicer* (1868) LR 5 Eq 527.

12 See *Naylor v Goodall* (1877) 47 LJ Ch 53.

13 See *Timmins v Moreland Street Property Co Ltd* [1958] Ch 110 at 118-121, [1957] 3 All ER 265 at 269-270, CA, per Jenkins LJ.

14 See *Cox v Middleton* (1854) 2 Drew 209 at 217 per Kindersley V-C. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

15 See *Timmins v Moreland Street Property Co Ltd* [1958] Ch 110, [1957] 3 All ER 265, CA.

16 See *Dolling v Evans* (1867) 36 LJ Ch 474.

17 See *Cox v Middleton* (1854) 2 Drew 209; *Dolling v Evans* (1867) 36 LJ Ch 474; *Cartwright v Miller* (1877) 36 LT 398; *Edwards v Jones* (1921) 124 LT 740, CA; *Harvey v Pratt* [1965] 2 All ER 786, [1965] 1 WLR 1025, CA; and *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386, [1992] 3 All ER 504, HL.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (3) FORMATION OF THE CONTRACT/(ii) The Requirement of a Written Contract/37. Indication of the price or other consideration.

#### 37. Indication of the price or other consideration.

The contract must state the agreed consideration<sup>1</sup> or the agreed means of ascertaining it<sup>2</sup>. In the absence of such indication, the law will not imply a term that a sale is to be for a reasonable price<sup>3</sup>. Any provision as to the method of payment must be specified in the contract<sup>4</sup>. Where land is purchased in three separate lots, at a separate price for each lot, a document setting out merely the total consideration is not a sufficient memorandum in support of any of the transactions<sup>5</sup>. A contract to purchase land 'at a fair price' or 'at a reasonable valuation' is sufficiently certain, and is enforceable<sup>6</sup>.

1 See *Elmore v Kingscote* (1826) 5 B & C 583 at 584; *Re Kharaskhoma Exploring and Prospecting Syndicate Ltd* [1897] 2 Ch 451 at 464, CA. The cases cited in this paragraph were all decided under legislation prior to the coming into force of the Law of Property (Miscellaneous Provisions) Act 1989: see PARA 29 note 3 ante. As to the statutory requirement for such contracts to be in writing see s 2 (as amended); and PARA 29 ante.

2 See *Milnes v Gery* (1807) 14 Ves 400 at 408; *Wilks v Davis* (1817) 3 Mer 507. See also *Frewen v Hays* (1912) 106 LT 516, PC. Where the means so specified cannot be followed, eg by reason of the death of the person agreed upon as valuer, it was formerly held that there is in effect no agreement as to price, and the court cannot ascertain the price in any other manner and enforce the contract with the price so ascertained, for that would be making a new agreement for the parties: see *Milnes v Gery* supra; *Blundell v Bettargh* (1810) 17 Ves 232; *Gourlay v Duke of Somerset* (1815) 19 Ves 429 at 430; *Wilks v Davis* supra; *Agar v Macklew* (1825) 2 Sim & St 418; *Morgan v Milman* (1853) 3 De GM & G 24 at 34; *Vickers v Vickers* (1867) LR 4 Eq 529; *Firth v Midland Rly Co* (1875) LR 20 Eq 100. However, those authorities must be reconsidered in the light of *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444, [1982] 3 All ER 1, HL, where a leasehold option to purchase a freehold reversion provided that the lessee could purchase at such price not being less than £12,000 as might be agreed by two valuers, one appointed by the lessor and one by the lessee, and in default of such an agreement by an umpire appointed by the valuers. The lessor refused to appoint a valuer. It was held that, on its true construction, the agreement was for a sale at a fair and reasonable price, and since the parties' machinery for ascertaining the price had broken down, the court would order an inquiry as to the fair valuation of the reversion. *Agar v Macklew* supra, and *Vickers v Vickers* supra, were specifically overruled. It seems to follow from the decision that, whenever the criteria for fixing the price are sufficiently specified (if they are not, the contract will presumably fail for uncertainty: see note 6 infra) and can be applied objectively, but the stipulated machinery for applying those criteria breaks down for any reason, the court will substitute its own machinery for applying the criteria.

3 *Gourlay v Duke of Somerset* (1815) 19 Ves 429 at 431; *Morgan v Milman* (1853) 3 De GM & G 24 at 37.

4 *Neale v Merrett* [1930] WN 189.

5 *Smith v MacGowan* [1938] 3 All ER 447.

6 *Milnes v Gery* (1807) 14 Ves 400 at 407; *Morgan v Milman* (1853) 3 De GM & G 24 at 34, 37; *Talbot v Talbot* [1968] Ch 1 at 12, [1967] 2 All ER 920 at 922, CA, per Harman LJ; *Brown v Gould* [1972] Ch 53, [1971] 2 All ER 1505. Cf the following cases where the contract was held void for uncertainty: *Courtney and Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* [1975] 1 All ER 716, [1975] 1 WLR 297, CA (building contract provides that the parties should 'negotiate fair and reasonable contract sums'); *King's Motors (Oxford) Ltd v Lax* [1969] 3 All ER 665, [1970] 1 WLR 426 (option to renew lease 'at such rental as may be agreed upon between the parties'); *Bushwall Properties Ltd v Vortex Properties Ltd* [1976] 2 All ER 283 (contract for sale of 51½ acres of land for £500,000 payable in instalments, with a provision that on each payment 'a proportionate part of the land shall be released'). See generally CONTRACT vol 9(1) (Reissue) PARA 672.

Where the price is to be fixed by a valuer, the valuer's decision is final unless fraud or collusion can be proved, or incorrect or incomplete reasons or calculations are stated by the valuer: *Campbell v Edwards* [1976] 1 All ER 785, [1976] 1 WLR 403, CA; *Baber v Kenwood Manufacturing Co Ltd and Whinney Murray & Co* [1978] 1 Lloyd's Rep 175, CA. A valuer owes a duty of care and may be liable in negligence: *Arensen v Casson Beckman Rutley & Co* [1977] AC 405, [1975] 3 All ER 901, HL. See generally BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARAS 294, 298.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (3) FORMATION OF THE CONTRACT/(ii) The Requirement of a Written Contract/38. Specification of other material terms not implied by law.

#### 38. Specification of other material terms not implied by law.

A contract for the sale or other disposition of an interest in land must incorporate all the terms that have been expressly agreed by the parties<sup>1</sup>. Where the defendant alleges that a contract, complete on the face of it, is in fact incomplete, oral evidence is admissible to show that other terms were agreed and have been omitted but the defendant must prove what the other terms were<sup>2</sup>. Thus an agreement that one party is to pay the other's legal fees should be included in the written document<sup>3</sup>, as should a provision as to the date for completion and vacant possession<sup>4</sup>, an undertaking to make up a road<sup>5</sup> and a provision for the payment of the purchase price in stages<sup>6</sup>. However, it is probably unnecessary for the written document to set out a term which the parties have expressly agreed but which is identical to one which the law will imply<sup>7</sup>.

The equitable remedy of rectification may be available if any term has been omitted from a written contract owing to a mistake common to both parties<sup>8</sup>. Such a remedy may be granted if there was a prior concluded agreement or if there was a clear common intention of the parties which had some outward expression of accord<sup>9</sup>. Where the remedy is available the court may in one action both rectify the contract and grant specific performance<sup>10</sup>.

1 See the Law of Property (Miscellaneous Provisions) Act 1989 s 2(1); and PARA 29 ante. For the meaning of 'interest in land' see PARA 31 ante.

2 See *Gibbins v North Eastern Metropolitan Asylum District* (1847) 11 Beav 1; *Ball v Bridges* (1874) 30 LT 430; *Jones v Daniel* [1894] 2 Ch 332; *Johnson v Humphrey* [1946] 1 All ER 460; *Beckett v Nurse* [1948] 1 KB 535, [1948] 1 All ER 81, CA (all decided under previous legislation).

3 See *North v Loomes* [1919] 1 Ch 378; *Scott v Bradley* [1971] Ch 850, [1971] 1 All ER 583 (both decided under previous legislation).

4 See *Hawkins v Price* [1947] Ch 645, [1947] 1 All ER 689 (decided under previous legislation). Cf *Fowler v Bratt* [1950] 2 KB 96, [1950] 1 All ER 662, CA (decided under previous legislation). The Standard Conditions of Sale (3rd Edn) include conditions providing for completion on a specified date, with a fallback date if no other date is agreed, and for vacant possession on the date of completion: see conditions 6, 7; and PARA 120 post. There is, therefore, no need to rely on an implied term: cf *Smith v Mansi* [1962] 3 All ER 857, [1963] 1 WLR 26, CA; *Lee-Parker v Izzet* [1971] 3 All ER 1099, [1971] 1 WLR 1688 (both decided under previous legislation). As to the Standard Conditions of Sale see PARA 1 note 9 ante.

5 See *Tweddell v Henderson* [1975] 2 All ER 1096, [1975] 1 WLR 1496 (decided under previous legislation).

6 See *Tweddell v Henderson* [1975] 2 All ER 1096, [1975] 1 WLR 1496 (decided under previous legislation). Other examples of material terms omitted from the memorandum are a reference to chattels included in the sale (*Blackburn v Walker* (1920) 150 LT Jo 73 (decided under previous legislation)), and a promise to forgo payment of a debt (*P Preece & Co Ltd v Lewis* (1963) 186 Estates Gazette 113 (decided under previous legislation)).

7 See *Farrell v Green* (1974) 232 Estates Gazette 587 (decided under previous legislation).

8 See the Law of Property (Miscellaneous Provisions) Act 1989 s 2(4); and PARA 29 ante. For examples of rectification following the Law of Property (Miscellaneous Provisions) Act 1989 see *Wright v Robert Leonard Developments Ltd* [1994] NPC 49, [1994] EGCS 69, CA; *Commission for the New Towns v Cooper (GB) Ltd* [1995] Ch 259, [1995] 2 All ER 929, CA.

9 See *Joscelyne v Nissen* [1970] 2 QB 86, [1970] 1 All ER 1213, CA (decided under previous legislation).

10 See *Craddock Bros v Hunt* [1923] 2 Ch 136, CA; *United States of America v Motor Trucks Ltd* [1924] AC 196, PC (both decided under previous legislation). As to the equitable remedy of rectification see MISTAKE vol 77 (2010) PARA 57 et seq. As to specific performance see SPECIFIC PERFORMANCE.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### 38 Specification of other material terms not implied by law

NOTE 8--See also *Swainland Builders Ltd v Freehold Properties Ltd* [2002] EWCA Civ 560, [2002] 23 EG 123.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (3) FORMATION OF THE CONTRACT/(ii) The Requirement of a Written Contract/39. Writing and signature.

### 39. Writing and signature.

The contract must be in writing, signed by or on behalf of each party to the contract<sup>1</sup>. 'Writing' includes typing, printing, lithography, photography and other modes of representing or reproducing words in a visible form<sup>2</sup>.

It is immaterial in what part of the document the signature is to be found, provided that it was intended to relate to and does in fact relate to every part of the document, so as to

authenticate the whole document<sup>3</sup>. Where the contract consists of more than one document, the signatures must appear on the primary contract document which incorporates terms from another document<sup>4</sup>.

A signature in pencil has been held to be sufficient<sup>5</sup>, and also a signature by initials<sup>6</sup>, or by means of a stamp or a mark<sup>7</sup>. It is not necessary to prove that the person making the mark could not write his name<sup>8</sup>. A letter bearing the handwritten signature of the vendor and the typewritten name and address of the purchaser is not signed by the purchaser<sup>9</sup>. Where an illiterate person held the top of the pen while another person wrote his name, it was held to be a sufficient signature<sup>10</sup>, but the mere tracing over a signature with a dry pen is not sufficient<sup>11</sup>. It is also sufficient if a third person writes the signature at the request of the party<sup>12</sup>. There is a sufficient signature where a handwritten contract begins: 'I, John Jones, have agreed...' <sup>13</sup>, or 'Mr John Jones has agreed...' <sup>14</sup>, and it is sufficient if only the surname is used<sup>15</sup>.

It is essential, however, that some indication of a name should appear; a contract signed 'Your affectionate mother' is insufficient<sup>16</sup>, as is a document containing the names of the parties and concluding with the words 'As witness our hands', but bearing no signatures<sup>17</sup>.

1 See the Law of Property (Miscellaneous Provisions) Act 1989 s 2(1), (3); and PARAS 29, 33 ante.

2 Interpretation Act 1978 s 5, Sch 1. This would clearly include a contract by telex, as in *Aquis Estates Ltd v Minton* [1975] 3 All ER 1043, [1975] 1 WLR 1452, CA.

3 *Caton v Caton* (1867) LR 2 HL 127; *Evans v Hoare* [1892] 1 QB 593; *Brooks v Billingham* (1912) 56 Sol Jo 503; *Leeman v Stocks* [1951] Ch 941, [1951] 1 All ER 1043 (all decided under previous legislation). A signature on a letter does not extend to a postscript headed 'Supplement' and written on a separate piece of paper which was sent with the letter but was not referred to in it (*Kronheim v Johnson* (1877) 7 ChD 60 (decided under previous legislation)), and a name inserted in the body of an instrument and applicable to particular purposes only is not sufficient (*Stokes v Moore* (1786) 1 Cox Eq Cas 219; *Caton v Caton* supra (both decided under previous legislation)).

4 See the Law of Property (Miscellaneous Provisions) Act 1989 s 2(2); *Firstpost Homes Ltd v Johnson* [1995] 4 All ER 355, [1995] 1 WLR 1567, CA; and PARA 29 ante.

5 See *Lucas v James* (1849) 7 Hare 410 at 419; and *Geary v Physic* (1826) 5 B & C 234 (both decided under previous legislation).

6 See *Chichester v Cobb* (1866) 14 LT 433; *Caton v Caton* (1867) LR 2 HL 127 at 143 per Lord Westbury (both decided under previous legislation). See also *Re Blewitt* (1880) 5 PD 116 (signature by initials sufficient for a will) (decided under previous legislation).

7 See *Bennett v Brumfitt* (1867) 37 LJCP 25 (decided under previous legislation). See also *Jenkins v Gaisford and Thring* (1863) 3 Sw & Tr 93; *Mcdonald v John Twiname Ltd* [1953] 2 QB 304, [1953] 2 All ER 589, CA; *Goodman v J Eban Ltd* [1954] 1 QB 550, [1954] 1 All ER 763, CA (all decided under previous legislation).

8 See *Baker v Dening* (1838) 8 Ad & El 94 (decided under previous legislation).

9 See *Firstpost Homes Ltd v Johnson* [1995] 4 All ER 355, [1995] 1 WLR 1567, CA, not following *Evans v Hoare* [1892] 1 QB 593 (decided under previous legislation). See also PARA 33 ante.

On the other hand, a printed heading of the name of a party is probably a sufficient signature if the remainder of the document is written by him or at his dictation, or is at the time or subsequently acknowledged by him: see *Schneider v Norris* (1814) 2 M & S 286; *Tourret v Cripps* (1879) 48 LJ Ch 567; *Hucklesby v Hook* (1900) 82 LT 117; *Leeman v Stocks* [1951] Ch 941, [1951] 1 All ER 1043 (all decided under previous legislation).

It has been held (under previous legislation) that if the vendor's agent inserts the vendor's name in a printed agreement and then procures the purchaser's signature, the document is sufficiently signed by the vendor: see *Leeman v Stocks* [1951] Ch 941, [1951] 1 All ER 1043 (decided under previous legislation). See also *Evans v Hoare* [1892] 1 QB 593 (decided under previous legislation).

10 *Helsham v Langley* (1841) 11 LJ Ch 17 (decided under previous legislation).

11 See *Re Maddock* (1874) LR 3 PD 169; *Re Cunningham* (1860) 4 Sw & Tr 194 (both decisions on wills and both decided under previous legislation).

- 12 *Brooks v Billingham* (1912) 56 Sol Jo 503 (decided under previous legislation).
- 13 *Knight v Crockford* (1794) 1 Esq 190 (decided under previous legislation). Cf *Wood v Smith* [1993] Ch 90, [1992] 3 All ER 556, CA (testator's signature only at beginning of will).
- 14 *Propert v Parker* (1830) 1 Russ & M 625; *Johnson v Dodgson* (1837) 2 M & W 653; *Bleakley v Smith* (1840) 11 Sim 150 (all decided under previous legislation).
- 15 *Lobb v Stanley* (1844) 5 QB 574 (decided under previous legislation).
- 16 *Selby v Selby* (1817) 3 Mer 2 (decided under previous legislation).
- 17 *Hubert v Treherne* (1842) 4 Scott NR 486, distinguished in *Leeman v Stocks* [1951] Ch 941, [1951] 1 All ER 1043. See also *Hawkins v Holmes* (1721) 1 P Wms 770, where the defendant altered the draft in his own hand but did not sign it. All the cases cited in this note were decided under previous legislation.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (3) FORMATION OF THE CONTRACT/(ii) The Requirement of a Written Contract/40. Signature by agent.

#### 40. Signature by agent.

The written contract must be signed by or on behalf of each party to the contract<sup>1</sup>. The contract may be signed by a person who is an agent of both parties<sup>2</sup>, for example a contract signed on behalf of both parties by an auctioneer immediately after a sale by auction<sup>3</sup>. The agent must be a third person; a contract cannot be signed by one of the parties to the contract as agent for the other so as to satisfy the statutory requirement<sup>4</sup>, although it may be signed on behalf of one party by a person who is already acting as agent of the other party<sup>5</sup>.

For the purpose of signing a contract, it has been held that an agent may be authorised orally<sup>6</sup>; and it may be proved by oral evidence that a person who signed a contract did so as agent for a third person<sup>7</sup>, so as to make that third person also liable on the contract<sup>8</sup>. It follows that, where an agent for the purchaser appointed by word of mouth purchases in his own name, oral evidence may be given to show that the real purchaser was not the person named in the contract, and the contract may be enforced by the principal against both the agent so appointed and the vendor<sup>9</sup>. In all cases there must be proof that the agent was expressly or impliedly authorised to sign the memorandum, in accordance with the ordinary principles of the law of agency<sup>10</sup>. A limited company must act through an agent, and a contract signed by the company secretary is sufficient<sup>11</sup>. The general authority of an estate agent is not to sell but to find a purchaser, and in such a case he has no implied authority to sign a contract<sup>12</sup>. The authority of an agent to sign a contract may be revoked at any time before it has been exercised, even after the terms of the contract have been agreed<sup>13</sup>.

If a party who has contracted as a principal signs a document by which he represents himself merely as the agent of a hitherto undisclosed principal, the document is not a sufficient memorandum, because it sets up a fresh term<sup>14</sup>. On the other hand, where a person known by

the vendor to be the agent of the purchaser contracts in his own name, the contract is enforceable even though the real purchaser's name is not mentioned in the contract<sup>15</sup>.

An agent cannot without the consent of his principal delegate his authority to sign a contract<sup>16</sup>; thus a signature by an auctioneer's clerk will not bind the vendor<sup>17</sup> unless he assents to the clerk so signing<sup>18</sup>. If the contract is signed by the delegate in the presence of the principal and without objection by him, that will normally be sufficient evidence of his assent<sup>19</sup>.

The statutory requirement of a written contract does not apply to a contract made in the course of a public auction<sup>20</sup>. However, it is thought likely that in most cases a written contract will in fact be used. An auctioneer is the agent of both purchaser and vendor for the purpose of signing the contract, and a contract signed by him is sufficient to bind both parties<sup>21</sup>, provided that he signs it immediately after the sale or so soon afterwards as to be part of the transaction of sale<sup>22</sup>. It is not sufficient for an auctioneer's name to be printed at the foot of particulars and conditions of sale<sup>23</sup>. The auctioneer's authority is limited to the sale by auction and does not extend to a private sale negotiated after an abortive auction<sup>24</sup>.

A solicitor has no general authority to sign a contract on behalf of his client<sup>25</sup>. Thus a solicitor who is merely instructed to draw up a contract has no authority to bind his client by signing the contract<sup>26</sup>. Whether the solicitor has such authority is a question of evidence in the particular case. The following instructions have been held to confer such authority: instructions to settle the terms of a contract<sup>27</sup>; or to perform a contract<sup>28</sup>; or to forward documents relating to a contract<sup>29</sup>. Instructions to deny a contract do not confer authority to sign a contract<sup>30</sup>; nor do instructions to act in a matter which is still in negotiation or subject to contract<sup>31</sup>.

1 See the Law of Property (Miscellaneous Provisions) Act 1989 s 1(3); and PARA 29 ante.

2 See *Heyman v Neale* (1809) 2 Camp 337; *Sievwright v Archibald* (1851) 17 QB 103; *Thompson v Gardiner* (1876) 1 CPD 777. The cases cited in this paragraph were all decided under legislation prior to the coming into force of the Law of Property (Miscellaneous Provisions) Act 1989; see PARA 29 note 3 ante. As to the statutory requirement for such contracts to be in writing see s 2 (as amended); and PARA 29 ante.

3 *Simon v Motivos* (1766) 3 Burr 1921; *Emmerson v Heelis* (1809) 2 Taunt 38; *Wood v Midgley* (1854) 5 De GM & G 41; *Peirce v Corf* (1874) LR 9 QB 210 at 214; *Cohen v Roche* [1927] 1 KB 169; *Richards v Phillips* [1969] 1 Ch 39, [1968] 2 All ER 859, CA.

4 *Wright v Dannah* (1809) 2 Camp 203; *Sharman v Brandt* (1871) LR 6 QB 720, Ex Ch. See also *Rayner v Linthorne* (1825) 2 C & P 124. Thus an auctioneer cannot sue on a contract signed by himself (see *Farebrother v Simmons* (1822) 5 B & Ald 333), but he may sue on a contract signed by his employee (see *Wilson & Sons v Pike* [1949] 1 KB 176, [1948] 2 All ER 267, CA).

5 *Bird v Boulter* (1833) 4 B & Ad 443; *Murphy v Boese* (1875) LR 10 Exch 126.

6 See *Waller v Hendon and Cox* (1723) 2 Eq Cas Abr 50; *Clinan v Cooke* (1802) 1 Sch & Lef 22; *Wilson v Hart* (1817) 7 Taunt 295; *Heard v Pilley* (1869) 4 Ch App 548; *Cave v Mackenzie* (1877) 46 LJ Ch 564; *James v Smith* [1891] 1 Ch 384 (affd 65 LT 544, CA); *Brooks v Billingham* (1912) 56 Sol Jo 503; *North v Loomes* [1919] 1 Ch 378.

7 *Heard v Pilley* (1869) 4 Ch App 548; *Cave v Mackenzie* (1877) 46 LJ Ch 564. However, where a contract is made between a builder and a person who is described throughout and signs as 'proprietor', oral evidence is not admissible to show that he is in fact merely the agent of another: *Formby Bros v Formby* [1910] WN 48, CA.

8 *Higgins v Senior* (1841) 8 M & W 834.

9 *Heard v Pilley* (1869) 4 Ch App 548; *Cave v Mackenzie* (1877) 46 LJ Ch 564. The admissibility of oral evidence cannot be resisted on the ground that the creation of a trust in land must be proved by writing (see the Law of Property Act 1925 s 53(1)(b)), because, inter alia, it would be inequitable in such a case for the agent to set up the statute: *Heard v Pilley* (1869) 4 Ch App 548; *Rochefoucauld v Boustead* [1897] 1 Ch 196, CA. See further AGENCY vol 1 (2008) PARAS 18, 36; TRUSTS vol 48 (2007 Reissue) PARA 644.

10 See generally AGENCY vol 1 (2008) PARA 29 et seq. The principle of ratification also applies in this context: see *Koenigsblatt v Sweet* [1923] 2 Ch 314, CA; and AGENCY vol 1 (2008) PARA 69.



11 *Beer v London and Paris Hotel Co* (1875) LR 20 Eq 412; *John Griffiths Cycle Corp Ltd v Humber & Co Ltd* [1899] 2 QB 414, CA (revsd on another point sub nom *Humber & Co v John Griffiths Cycle Co* (1901) 85 LT 141, HL). See also *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711, [1971] 3 All ER 16, CA.

12 *Godwin v Brind* (1868) LR 5 CP 299n; *Wire v Pemberton* (1854) 23 LTOS 345; *Hamer v Sharp* (1874) LR 19 Eq 108; *Vale of Neath Colliery Co v Furness* (1876) 45 LJ Ch 276; *Prior v Moore* (1887) 3 TLR 624; *Chadburn v Moore* (1892) 61 LJ Ch 674; *Keen v Mear* [1920] 2 Ch 574; *Lewcock v Bromley* (1920) 127 LT 116; *Wragg v Lovett* [1948] 2 All ER 968, CA. See further AGENCY vol 1 (2008) PARA 41.

13 *Farmer v Robinson* (1805) 2 Camp 339n; *Warwick v Slade* (1811) 3 Camp 127. However, the auctioneer's implied authority cannot be revoked after the fall of the hammer: *Phillips v Butler* [1945] Ch 358, [1945] 2 All ER 258; and see AUCTION vol 2(3) (Reissue) PARA 214.

It has been held (under previous legislation) that the signature of an agent may bind his principal even though the agent signs only in the character of witness: see *Wallace v Roe* [1903] 1 IR 32.

14 *Re Cox, McEwen & Co and Hoare Marr & Co* (1907) 96 LT 719, CA; *Lovesey v Palmer* [1916] 2 Ch 233; *Keen v Mear* [1920] 2 Ch 574.

15 *Basma v Weekes* [1950] AC 441, sub nom *Abdul Karim Basma v Weekes* [1950] 2 All ER 146, PC, disapproving a dictum of Luxmoore LJ to the contrary in *Smith-Bird v Blower* [1939] 2 All ER 406 at 407. That dictum was again disapproved in *Davies v Sweet* [1962] 2 QB 300, [1962] 1 All ER 92, CA.

16 *Henderson v Barnewall* (1827) 1 Y & J 387; *Blore v Sutton* (1817) 3 Mer 237.

17 *Bell v Balls* [1897] 1 Ch 663; *Gosbell v Archer* (1835) 2 Ad & El 500.

18 *Coles v Trecothick* (1804) 9 Ves 234; *Dyas v Stafford* (1882) 7 LR Ir 520, Ir CA.

19 *Bird v Boulter* (1833) 4 B & Ad 443; *Sims v Landray* [1894] 2 Ch 318; *Brooks v Billingham* (1912) 56 Sol Jo 503.

20 See the Law of Property (Miscellaneous Provisions) Act 1989 s 2(5)(b).

21 *Simon v Motivos* (1766) 3 Burr 1921; *Emmerson v Heelis* (1809) 2 Taunt 38; *Wood v Midgley* (1854) 5 De GM & G 41; *Peirce v Corf* (1874) LR 9 QB 210 at 214; *Cohen v Roche* [1927] 1 KB 169; *Richards v Phillips* [1969] 1 Ch 39, [1968] 2 All ER 859, CA.

22 *Matthews v Baxter* (1873) LR 8 Exch 132 (signature eight days after sale too late); *Bell v Balls* [1897] 1 Ch 663 (signature one week after sale too late); *Chaney v Maclow* [1929] 1 Ch 461, CA (signature on day of auction sufficient). See also *Phillips v Butler* [1945] Ch 358 at 363, [1945] 2 All ER 258 at 263.

23 *Dyas v Stafford* (1882) 7 LR Ir 520, CA.

24 *Mews v Carr* (1856) 1 H & N 484.

25 *Forster v Rowland* (1861) 7 H & N 103; *Matthews v Baxter* (1873) LR 8 Exch 132; *Smith v Webster* (1876) 3 ChD 49, CA. This must equally be true of a licensed conveyancer: see PARA 3 ante.

26 *Forster v Rowland* (1861) 7 H & N 103; *Smith v Webster* (1876) 3 ChD 49, CA; *Bowen v Duc d'Orléans* (1900) 16 TLR 226, CA; *Goodall v Harding* (1884) 52 LT 126.

27 *Jolliffe v Blumberg* (1870) 18 WR 784.

28 *North v Loomes* [1919] 1 Ch 378; *Horner v Walker* [1923] 2 Ch 218; *Gavaghan v Edwards* [1961] 2 QB 220, [1961] 2 All ER 477, CA.

29 *Daniels v Trefusis* [1914] 1 Ch 788. As to the authority of a solicitor to effect an exchange of contracts see *Domb v Isoz* [1980] Ch 548, [1980] 1 All ER 942, CA; and PARA 23 ante.

30 *Thirkell v Cambi* [1919] 2 KB 590, CA.

31 *D'silva v Lister House Development Ltd* [1971] Ch 17 at 28, 29, [1970] 1 All ER 858 at 866, per Buckley J; *Griffiths v Young* [1970] Ch 675 at 685, [1970] 3 All ER 601 at 607, CA, per Widgery LJ; and see *Tiverton Estates Ltd v Wearwell Ltd* [1975] Ch 146, [1974] 1 All ER 209, CA.

## UPDATE

## **1-136 The Contract and Preliminary Matters**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### **40 Signature by agent**

NOTE 1--1989 Act s 1(3) amended: Regulatory Reform (Execution of Deeds and Documents) Order 2005, SI 2005/1906.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(4) DISCLOSURE OF MATERIAL FACTS/(i) In general/41. Avoidance of contract.

## **(4) DISCLOSURE OF MATERIAL FACTS**

### **(i) In general**

#### **41. Avoidance of contract.**

In certain cases a contract may be avoided on the ground that the consent of one of the parties was given in ignorance of material facts which were within the knowledge of the other party<sup>1</sup>. A contract for the sale of land is not a contract of the utmost good faith in which there is an absolute duty upon each party to make full disclosure to the other of all material facts of which he has full knowledge<sup>2</sup>, but the contract may be avoided on the ground of misrepresentation, fraud or mistake in the same way as any other contract<sup>3</sup>, and also on the ground of non-disclosure of latent defects of title<sup>4</sup>.

1 See CONTRACT vol 9(1) (Reissue) PARA 701; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 701; MISTAKE.

2 See eg INSURANCE vol 25 (2003 Reissue) PARA 36 et seq; PARTNERSHIP vol 79 (2008) PARAS 106-109.

3 See CONTRACT vol 9(1) (Reissue) PARA 701 et seq; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 814 et seq; MISTAKE.

4 As to the duty to disclose defects in title see PARAS 54-61 post.

## **UPDATE**

## **1-136 The Contract and Preliminary Matters**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### **41 Avoidance of contract**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(4) DISCLOSURE OF MATERIAL FACTS/(i) In general/42. Damages for misrepresentation.

## 42. Damages for misrepresentation.

Innocent misrepresentation may be a ground for avoiding a contract and may be a defence to an action for specific performance<sup>1</sup>. Prior to the enactment of the Misrepresentation Act 1967<sup>2</sup>, damages could only be awarded if the misrepresentation were fraudulent<sup>3</sup>, negligent<sup>4</sup> or a breach of fiduciary duty<sup>5</sup>. Damages could not, therefore, be awarded for a purely innocent misrepresentation<sup>6</sup>, nor could the purchaser be granted specific performance with abatement of price<sup>7</sup>. The Misrepresentation Act 1967 provides that damages for misrepresentation are available as of right unless the person making the misrepresentation proves that he believed, on reasonable grounds, in the truth of the facts represented up to the time when the contract was made<sup>8</sup>. Such damages are assessed on the tortious basis and will not include damages for loss of a bargain<sup>9</sup>. Where a person has entered into a contract after a misrepresentation has been made to him otherwise than fraudulently, the court has a discretion to award damages in lieu of rescission if it is equitable to do so having regard to the nature of the misrepresentation and the loss that would be caused by it if the contract were to be upheld, as well as to the loss that rescission would cause to the other party<sup>10</sup>.

The vendor's solicitor<sup>11</sup> does not normally owe a duty of care to the purchaser<sup>12</sup>. Where the misrepresentation relates to the vendor's title, damages may be awarded for loss of a bargain<sup>13</sup>. The right to rescind does not run with the land, so a sub-purchaser has no right to rescind as against the original vendor, even if the transfer is made by the original vendor direct to the sub-purchaser<sup>14</sup>.

1 See MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 782-788. As to specific performance see SPECIFIC PERFORMANCE.

2 Ie prior to the Misrepresentation Act 1967: see generally MISREPRESENTATION AND FRAUD.

3 *Derry v Peek* (1889) 14 App Cas 337, HL; *Akerhielm v de Mare* [1959] AC 789, [1959] 3 All ER 485, PC.

4 *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, [1963] 2 All ER 575, HL; *WB Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850, 31 MLR 322; *Esso Petroleum Co Ltd v Mardon* [1976] QB 801, [1976] 2 All ER 5, CA.

5 *Nocton v Lord Ashburton* [1914] AC 932, HL; *Woods v Martins Bank Ltd* [1959] 1 QB 55, [1958] 3 All ER 166.

6 See eg *Lawrence v Hull* (1924) 41 TLR 75; *Terrene Ltd v Nelson* [1937] 3 All ER 739. On rescission a financial indemnity may be awarded in respect of obligations created by the contract, such as the costs attending on purchase: see *Hart v Swaine* (1877) 7 ChD 42; *Whittington v Seale-Hayne* (1900) 82 LT 49. See also CONTRACT vol 9(1) (Reissue) PARAS 986-987; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 812 et seq. As to the distinction between terms and representations see CONTRACT vol 9(1) (Reissue) PARA 767; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 704.

7 *Gilchester Properties Ltd v Gomm* [1948] 1 All ER 493 (incorrect reply to preliminary inquiries regarding rents at which properties were let). An innocent misrepresentation may, however, give rise to an estoppel:

*Oades v Spafford* [1948] 2 KB 74, [1948] 1 All ER 607, CA; see generally ESTOPPEL vol 16(2) (Reissue) PARA 1052 et seq.

8 See the Misrepresentation Act 1967 s 2(1); and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 801. As to availability of defence of *ex turpi causa non oritur actio* to claim for damages see *Saunders v Edwards* [1987] 2 All ER 651, [1987] 1 WLR 1116, CA.

9 See *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297, [1991] 3 All ER 294, CA; *Cemp Properties (UK) Ltd v Dentsply Research and Development Corp (Denton, Hall & Burgin (Third Parties))* [1991] 2 EGLR 197; *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932, [1994] 1 WLR 1016, CA.

10 See the Misrepresentation Act 1967 s 2(2); and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 834. See also *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932 at 952-995, [1994] 1 WLR 1016 at 1035-1038, CA, per Hoffmann LJ. The completion of a contract for the sale of land is not a bar to rescission (see the Misrepresentation Act 1967 s 1(b)), but if rescission would upset a chain of transactions the court might well award damages in lieu of rescission. As to contractual provisions purporting to restrict or exclude liability for misrepresentation see PARA 116 post.

11 See PARA 3 ante.

12 See *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560, [1992] 1 All ER 865. See also *Al-Kandari v JR Brown & Co (a firm)* [1988] QB 665, [1988] 1 All ER 833, CA; and cf *Wilson v Bloomfield* (1979) 123 Sol Jo 860, CA. As to the duty of care generally see NEGLIGENCE.

13 *Watts v Spence* [1976] Ch 165, [1975] 2 All ER 578. See further PARA 256 post.

14 *Gross v Lewis Hillman Ltd* [1970] Ch 445, [1969] 3 All ER 1476, CA. The position would be different if the original purchaser were authorised or intended to pass on the representation to the sub-purchaser: see *Gross v Lewis Hillman Ltd* supra; para 359 post; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 737. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(4) DISCLOSURE OF MATERIAL FACTS/(i) In general/43. What amounts to a representation.

#### 43. What amounts to a representation.

Representations of fact as to the quality of the subject matter of a contract must be distinguished from such expressions of opinion as to its value or desirability as do not involve any representation of fact. A purchaser cannot avoid liability to perform his contract on the ground that he has been misled by statements which are mere puffing. It has been held to be puffing to describe property as a desirable residence for a family of distinction, when in fact it is a small farmhouse<sup>1</sup>, or (formerly) to describe renewable leaseholds as nearly equal to freehold<sup>2</sup>, or to describe a house as substantial and convenient<sup>3</sup>, or well built<sup>4</sup>, or eligible<sup>5</sup>. Where, however, a landlord who has the means of knowing the character of his tenant describes him to an intending purchaser as a most desirable tenant, this is a representation of fact, and the purchaser has a remedy if it turns out that the tenant has paid his last quarter's rent by dribblets under pressure<sup>6</sup>.

A statement of belief may amount to an implied representation that there are reasonable grounds for that belief, and is actionable by a purchaser if he has been induced to enter the contract by the representation and it is untrue<sup>7</sup>. Even where a vendor's replies to preliminary inquiries are qualified by the phrase 'so far as the vendor is aware', liability for misrepresentation may arise, since such a qualifying statement amounts to an implied representation that such inquiries have been made to determine the truth of the matter as would have been made by a prudent conveyancer<sup>8</sup>.

1 *Magennis v Fallon* (1828) 2 Mol 561 at 589.

2 *Fenton v Browne* (1807) 14 Ves 144 at 149. Perpetually renewable leaseholds cannot now exist: see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 541.

3 *Johnson v Smart* (1860) 2 Giff 151; affd 2 LT 783.

4 *Kennard v Ashman* (1894) 10 TLR 213; affd 10 TLR 447, CA. However, a house of which the external walls are composed partly of brick and partly of lath and plaster must not be described as brick built: see *Powell v Double* (1832), cited in Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 29.

5 *Hope v Walter* [1900] 1 Ch 257 at 258, CA, per Lindley MR. It has also been held to be mere puffing to describe an imperfectly watered piece of land as uncommonly rich water meadow land (*Scott v Hanson* (1826) 1 Sim 13; affd (1829) 1 Russ & M 128), or land as fertile and improvable when part of it has been abandoned as useless (*Dimmock v Hallett* (1866) 2 Ch App 21 at 27 per Turner LJ); but these cases seem to involve misrepresentations of fact. Cf *Robinson v Musgrove* (1838) 8 C & P 469; and see further MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 709-710, 715-716.

6 *Smith v Land House Property Corpn* (1884) 28 ChD 7 at 15-16, CA, per Bowen LJ. See also *Bisset v Wilkinson* [1927] AC 177 at 182, PC.

7 *Brown v Raphael* [1958] Ch 636, [1958] 2 All ER 79, CA (statement as to prospective liability to death duty in the words that an annuitant 'is believed to have no aggregable estate'); *Goff v Ganthier* (1991) 62 P & CR 388 (untrue statement of intention to offer contract to another prospective purchaser at a higher price). See also MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 710.

8 See *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932, [1994] 1 WLR 1016, CA; and see also *Cremdean Properties Ltd v Nash* (1977) 244 Estates Gazette 547 at 551, CA, per Bridge LJ; *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560, [1992] 1 All ER 865; and cf *Gilchester Properties Ltd v Gomm* [1948] 1 All ER 493 at 495, [1948] WN 71, per Romer J. A solicitor's knowledge will be imputed to his client: *Strover v Harrington* [1988] Ch 390, [1988] 1 All ER 769.

## UPDATE

### 1-136 The Contract and Preliminary Matters

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Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(4) DISCLOSURE OF MATERIAL FACTS/(i) In general/44. Removable and irremovable defects.

#### 44. Removable and irremovable defects.

Where a defect of title is removable by the vendor, for example a mortgage which can be paid off, the purchaser cannot repudiate the contract on the ground of non-disclosure<sup>1</sup>. However, an

irremovable, latent and undisclosed defect, such as a binding restrictive covenant, entitles the purchaser to refuse to complete<sup>2</sup>, unless he actually knew of the defect at the time of entering into the contract<sup>3</sup>. The vendor need not disclose matters which are necessarily incident to his tenure of the property<sup>4</sup>.

1 Cf *Brickles v Snell* [1916] 2 AC 599, PC. There is no need to mention such an incumbrance in the conditions of sale: see PARA 91 post.

2 See eg *Nottingham Patent Brick and Tile Co v Butler* (1886) 16 QBD 778, CA; and PARA 54 et seq post. The distinction between removable and irremovable defects has never been very clearly defined. A usual illustration of a removable defect is a covenant to repair which has not been complied with. 'Irremovable' in this context means irremovable by the vendor, with or without the parties upon whose concurrence in the removal he is entitled to insist. The fact that a defect can be removed by a third person or a local or public authority does not make it any the less irremovable in the sense in which that word is here used unless the vendor can insist upon its removal. As to the vendor's obligations with respect to a spouse's statutory rights of occupation of the matrimonial home see the Family Law Act 1996 s 32, Sch 4 para 3; and PARA 123 post.

3 So far as concerns incumbrances registered under the Land Charges Act 1972, the question whether the purchaser had knowledge is to be determined without reference to the provisions under which registration constitutes actual notice (ie the Law of Property Act 1925 s 198 (as amended) (see EQUITY vol 16(2) (Reissue) PARA 577)): see the Law of Property Act 1969 s 24; and PARA 54 post.

4 See PARA 61 post. See also *Re City of London Real Property Co Ltd's Appeal* [1949] Ch 581 at 588, [1949] 1 All ER 763 at 766 per Vaisey J, where the distinction between general restrictions on property and particular restrictions on property to be sold is stated.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(4) DISCLOSURE OF MATERIAL FACTS/ (ii) Disclosure by the Vendor/A. DEFECTS OF QUALITY/45. Patent defects of quality.

## (ii) Disclosure by the Vendor

### A. DEFECTS OF QUALITY

#### 45. Patent defects of quality.

Defects of quality may be either patent or latent. Patent defects are such as are discoverable by inspection and ordinary vigilance on the part of a purchaser<sup>1</sup>, and latent defects are such as would not be revealed by any inquiry which a purchaser is in a position to make before entering into the contract for purchase<sup>2</sup>.

The vendor is not bound to call attention to patent defects; the rule is 'caveat emptor'<sup>3</sup>. Therefore, a purchaser should make inspection and inquiry as to what he is proposing to buy<sup>4</sup>. If he omits to ascertain whether the land is such as he desires to acquire, he cannot complain afterwards on discovering defects of which he would have been aware if he had taken ordinary steps to ascertain its physical condition<sup>5</sup>; and, although as a general rule a vendor must deliver

property corresponding to the description contained in the contract<sup>6</sup>, yet an error in the particulars or description of the property in the contract is not a ground of objection if it is readily corrected on inspection<sup>7</sup>.

1 In order to be a patent defect, the defect must either be visible to the eye, or arise by necessary implication from something visible to the eye: *Yandle & Sons v Sutton* [1922] 2 Ch 199. See also *Ashburner v Sewell* [1891] 3 Ch 405 at 408; *Simpson v Gilley* (1922) 92 LJ Ch 194. A defect is not patent if it can only be discovered by minute inspection such as a purchaser cannot be reasonably expected to make: *Shepherd v Croft* [1911] 1 Ch 521 at 529.

2 As to latent defects of quality see PARA 48 post.

3 See EQUITY vol 16(2) (Reissue) PARA 413; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 748-751.

4 *Lowndes v Lane* (1789) 2 Cox Eq Cas 363; *Edwards-Wood v Marjoribanks* (1860) 7 HL Cas 806 at 809-811; *Cook v Waugh* (1860) 2 Giff 201 at 206; Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 328; and see EQUITY vol 16(2) (Reissue) PARA 413; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 748-751. As to preliminary inquiries generally see PARA 4 et seq ante; as to inquiries of tenants see PARA 6 ante; and as to the rule that occupation is notice of a tenant's rights see PARA 329 post.

5 *Oldfield v Round* (1800) 5 Ves 508, where the contract was for the sale of a meadow without mention of a road across it, the road being obviously a road used either by third persons or by the public in general. See also *Ashburner v Sewell* [1891] 3 Ch 405 at 409; *Yandle & Sons v Sutton* [1922] 2 Ch 199; *Simpson v Gilley* (1922) 92 LJ Ch 194. See also *Keates v Earl of Cadogan* (1851) 10 CB 591 at 600 (agreement for tenancy of a dwelling house in an obviously ruinous and unsafe condition); *Cook v Waugh* (1860) 2 Giff 202 (agreement to take a lease of a house with a cracked wall and otherwise greatly out of repair). After personal inspection, the purchaser cannot contradict his own view as to the state of repair on the ground that he is not a surveyor: *Haywood v Cope* (1858) 25 Beav 140 at 148. As to the advisability of the purchaser having the property surveyed and his position where the property has been surveyed on behalf of a mortgagee see PARA 7 ante.

6 See *Flight v Booth* (1834) 1 Bing NC 370 at 377.

7 *Dyer v Hargrave, Hargrave v Dyer* (1805) 10 Ves 505 at 508, where a farm was described as being 'within a ring fence'; *White v Bradshaw* (1851) 16 Jur 738, where a house in Brighton was described as '39 Regency Square', its usual description, although it was not actually in Regency Square. It is otherwise where the description is substantially wrong: *Stanton v Tattersall* (1853) 1 Sm & G 529; and see PARA 52 note 11 post.

## UPDATE

### 1-136 The Contract and Preliminary Matters

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Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(4) DISCLOSURE OF MATERIAL FACTS/ (ii) Disclosure by the Vendor/A. DEFECTS OF QUALITY/46. Concealment by the vendor.

#### 46. Concealment by the vendor.

A representation as to the property which is contradicted by its obvious physical condition does not enable the purchaser to repudiate the contract or obtain compensation, unless, in reliance on the representation, he abstains from inspecting it<sup>1</sup>. However, any active concealment by the vendor of defects which would otherwise be patent is treated as fraudulent, and the contract is voidable by the purchaser<sup>2</sup> if he has been deceived by it<sup>3</sup>. Any conduct calculated to mislead a

purchaser or lull his suspicions with regard to a defect known to the vendor has the same effect<sup>4</sup>.

1 *Grant v Munt* (1815) Coop G 173. Cf *Denny v Hancock* (1870) 6 Ch App 1, where inspection of the property did not reveal the fact that a plan was misleading; *Re Arnold, Arnold v Arnold* (1880) 14 ChD 270, CA.

2 Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 2, 333-335; *Shirley v Stratton* (1785) 1 Bro CC 440; *Pickering v Dowson* (1813) 4 Taunt 779 at 785; *Small v Attwood* (1832) You 407 at 490 (on appeal *Attwood v Small* (1838) 6 Cl & Fin 232, HL). This is so notwithstanding that the property is sold with all faults: *Baglehole v Walters* (1811) 3 Camp 154 at 156; *Schneider v Heath* (1813) 3 Camp 506. See MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 720, 750-751.

3 In *Horsfall v Thomas* (1862) 1 H & C 90, a vendor of a gun which he had made to the purchaser's order concealed a defect, but as the purchaser never inspected the gun the concealment had no operation on his mind or conduct, and he was not allowed to avoid the contract on the ground of the vendor's fraud. This decision was dissented from by Cockburn CJ in *Smith v Hughes* (1871) LR 6 QB 597 at 605, but appears to be correct: see *Coaks v Boswell* (1886) 11 App Cas 232 at 236, HL; *Shepherd v Croft* [1911] 1 Ch 521 at 530; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 765 et seq.

4 See *Small v Attwood* (1832) You 407 (revsd *Attwood v Small* (1838) 6 Cl & Fin 232, HL, on the grounds that fraud had not been proved and that the purchasers had not relied on the representations made). See also MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 742 et seq.

## UPDATE

### 1-136 The Contract and Preliminary Matters

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Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(4) DISCLOSURE OF MATERIAL FACTS/ (ii) Disclosure by the Vendor/A. DEFECTS OF QUALITY/47. Purchaser's erroneous opinion.

#### 47. Purchaser's erroneous opinion.

If the purchaser has an opportunity of forming an independent opinion, he alone is responsible for the opinion that he forms, whether in fact he uses the opportunity or not, and the vendor is not bound to correct the opinion if erroneous<sup>1</sup>. It makes no difference that the vendor knows or believes that the purchaser contracts in reliance upon his erroneous opinion<sup>2</sup>. There is an exception where a purchaser mistakenly believes that the vendor is in effect giving a warranty as to quality and enters into the contract on that footing, and the vendor is aware of the mistake. It is then the vendor's duty to correct the mistake, and, if he fails to do so, the contract is not binding on the purchaser<sup>3</sup>.

1 *Smith v Hughes* (1871) LR 6 QB 597; cf *Lowndes v Lane* (1789) 2 Cox Eq Cas 363. See MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 751.

2 *Smith v Hughes* (1871) LR 6 QB 597 at 607 per Blackburn J.

3 *Smith v Hughes* (1871) LR 6 QB 597 at 610 per Hannen J.

## UPDATE



## 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(4) DISCLOSURE OF MATERIAL FACTS/ (ii) Disclosure by the Vendor/A. DEFECTS OF QUALITY/48. Latent defects of quality.

### 48. Latent defects of quality.

Prima facie the rule 'caveat emptor'<sup>1</sup> applies also to latent defects of quality or other matters (not being defects of title) which affect the value of the property sold, and the vendor, even if he is aware of any such matters, is under no general obligation to disclose them<sup>2</sup>. There is no implied warranty that land agreed to be sold is of any particular quality or suitable for any particular purpose<sup>3</sup>. The vendor of a house who sells it after it has been completed gives no implied warranty to the purchaser that it is safe, even if he is also its builder<sup>4</sup>; and, although a vendor, and a builder, owes a duty of care in negligence with regard to defects created by him, the potential liability extends only to damage causing physical injury to persons or damage to other property<sup>5</sup>. Where a house in course of erection is sold by the builder there is an implied warranty that it will be completed in a proper and workmanlike manner and will be reasonably fit for human habitation<sup>6</sup>; but, even in such a case, no implied warranty is applicable if there is an express contract between the parties as to the way in which the building is to be completed<sup>7</sup> or a covenant by the purchaser that, having inspected the property, he is satisfied with it and agrees to pay for any alterations required by him<sup>8</sup>.

The implied warranty applies where the builder departs from an agreed specification, even by improving on it<sup>9</sup>; and where there is an express undertaking to complete the house in a proper and workmanlike manner in accordance with an agreed specification, the builder is liable for using defective materials even though they accord with the specification<sup>10</sup>.

1 See PARA 45 ante. A contract of sale of land is different from a contract of insurance which is a contract of the utmost good faith: see *Turner v Green* [1895] 2 Ch 205 at 208; and INSURANCE vol 25 (2003 Reissue) PARA 36 et seq. The rule 'caveat emptor' does not, however, apply where there has been a misrepresentation by the vendor (*Colby v Gadsden* (1867) 17 LT 97; see also *Mills v Oddy* (1835) 2 Cr M & R 103), although silence by itself does not amount to misrepresentation (*Seddon v North Eastern Salt Co Ltd* [1905] 1 Ch 326 at 335); cf para 46 ante.

2 There is no fiduciary relationship between vendor and purchaser in the negotiation of the agreement: *Walters v Morgan* (1861) 3 De GF & J 718 at 723; *Turner v Green* [1895] 2 Ch 205 at 209. Thus mere silence as regards a material fact which the one party is not bound to disclose to the other is not a ground for rescission of the contract, or a defence to specific performance: *Turner v Green* supra at 208 (non-disclosure of a fact likely to influence the other party not to compromise proceedings). See also *Greenhalgh v Brindley* [1901] 2 Ch 324 (non-disclosure of deed preventing acquisition of easement of light); *Re Ward and Jordan's Contract* [1902] 1 IR 73 (non-disclosure on sale of licensed premises of fact that a conviction has been indorsed on the licence); *Percival v Wright* [1902] 2 Ch 421 (purchase of shares in a company by directors without disclosing pending negotiations for sale of the company's undertaking).

3 *Miller v Cannon Hill Estates Ltd* [1931] 2 KB 113 at 120 per Swift J; *Otto v Bolton and Norris* [1936] 2 KB 46 at 52, [1936] 1 All ER 960 at 965. See also PARA 353 post.

4 *Bottomley v Bannister* [1932] 1 KB 458, CA; *Otto v Bolton and Norris* [1936] 2 KB 46, [1936] 1 All ER 960.

5 *Murphy v Brentwood District Council* [1991] 1 AC 398, [1990] 2 All ER 908, HL (local authority not liable for cost of repairing defect if discovered before harm caused by it); and see *Department of the Environment v Thomas Bates & Son* [1991] 1 AC 499, [1990] 2 All ER 943, HL (builder was not liable in tort for the cost of remedying defects in a building in order to make it safe and suitable for its intended purpose where there was no damage to the building and no imminent danger to personal safety and health). After these decisions it is uncertain whether a similar duty of care is owed by a local authority which exercises its statutory power to inspect a building in course of erection. The duty is not abated by the subsequent disposal of the premises by the person who owed the duty: see the Defective Premises Act 1972 s 3. A valuer who prepares a valuation report for a mortgagee owes a duty of care to the purchaser: *Yianni v Edwin Evans & Sons* [1982] QB 438, [1981] 3 All ER 592; *Smith v Eric S Bush (a firm)*, *Harris v Wyre Forest District Council* [1990] 1 AC 831, [1989] 2 All ER 514, HL; and see BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 300. As to the duty of care generally see NEGLIGENCE.

6 *Miller v Cannon Hill Estates Ltd* [1931] 2 KB 113; *Perry v Sharon Development Co Ltd* [1937] 4 All ER 390, CA, where the distinction between a completed house and one in course of erection is considered; *Hoskins v Woodham* [1938] 1 All ER 692, where the house was held to be complete at the time of the sale. The implied warranty extends to the foundations: *Jennings v Tavener* [1955] 2 All ER 769, [1955] 1 WLR 932; *Hancock v BW Brazier (Anerley) Ltd* [1966] 2 All ER 901, [1966] 1 WLR 1317, CA. The question whether a house is a completed house or in course of erection is a question of fact: *Brown v Norton* [1954] 1 IR 34.

7 *Lynch v Thorne* [1956] 1 All ER 744, [1956] 1 WLR 303, CA; cf *Basildon District Council v JE Lesser (Properties) Ltd* [1985] QB 839, [1985] 1 All ER 20. The warranty may also be excluded by the surrounding circumstances: *Young and Marten Ltd v McManus Childs Ltd* [1969] 1 AC 454, [1968] 2 All ER 1169, HL; *Gloucestershire County Council v Richardson* [1969] 1 AC 480, [1968] 2 All ER 1181, HL.

8 *Brown v Norton* [1954] IR 34.

9 *King v Victor Parsons & Co* [1972] 2 All ER 625, [1972] 1 WLR 801 (not challenged on appeal [1973] 1 All ER 206, [1973] 1 WLR 29, CA).

10 *Hancock v BW Brazier (Anerley) Ltd* [1966] 2 All ER 901, [1966] 1 WLR 1317, CA.

## UPDATE

### 1-136 The Contract and Preliminary Matters

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### 48-49 Latent defects of quality, Statutory duty as to defective premises

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(4) DISCLOSURE OF MATERIAL FACTS/(ii) Disclosure by the Vendor/A. DEFECTS OF QUALITY/49. Statutory duty as to defective premises.

#### 49. Statutory duty as to defective premises.

A person who takes on work<sup>1</sup> for or in connection with the building, conversion or enlargement of a dwelling owes a statutory duty (additional to any duty imposed at common law<sup>2</sup>) to the person ordering the work<sup>3</sup>, and to every other person who acquires a legal or equitable interest in the dwelling<sup>4</sup>, to see that the work is done in a workmanlike or, as the case may be,

professional manner, with proper materials, so that the dwelling will be fit for habitation when completed<sup>5</sup>.

A person who takes on such work for another on terms that he is to do it in accordance with instructions given by or on behalf of that other is, to the extent to which he does it properly in accordance with those instructions, to be treated as discharging the duty, except where he owes a duty to that other to warn him of any defects in the instructions and fails to discharge that duty<sup>6</sup>. For this purpose a person is not treated as having given instructions for the doing of work merely because he has agreed to the work being done in a specified manner, with specified materials or to a specified design<sup>7</sup>.

The limitation period in respect of any cause of action arising out of any breach of the duty imposed by these provisions runs from the time when the dwelling is completed<sup>8</sup>.

Where construction, repair, maintenance, demolition or any other work is done on or in relation to premises, any duty of care owed, because of the doing of the work, to persons who might reasonably be expected to be affected by defects in the state of the premises is not abated by the subsequent disposal<sup>9</sup> of the premises by the person who owed the duty<sup>10</sup>.

Many new houses are now guaranteed against defects under the National House Building Council Scheme 1979<sup>11</sup>. Where a standard or common form notice of insurance cover is issued under the scheme, the statutory duty is excluded<sup>12</sup>.

1 A person who (1) in the course of a business consisting of or including providing or arranging for the provision of dwellings or installations in them; or (2) in the exercise of a power of making such provision or arrangements conferred by or by virtue of any enactment, arranges for another to take on work for or in connection with the provision of a dwelling is treated for these purposes as included among the persons who have taken on the work: Defective Premises Act 1972 s 1(4). These provisions apply not only where a contractual obligation to work exists but also where the work is done without contractual obligation, or done voluntarily or done by the building owner himself: *Alexander v Mercouris* [1979] 3 All ER 305, [1979] 1 WLR 1270, CA.

2 Defective Premises Act 1972 s 6(2).

3 Ibid s 1(1)(a).

4 Ibid s 1(1)(b).

5 Ibid s 1(1). Any term of an agreement purporting to exclude or restrict the operation of any provision of the Defective Premises Act 1972 or any liability arising by virtue of any such provision is void: s 6(3). As to the limited application of these provisions to the Crown see s 5. See generally BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 77 et seq.

6 Ibid s 1(2).

7 Ibid s 1(3).

8 Ibid s 1(5). If any further work has been done to rectify work already done, the cause of action in respect of the further work is deemed to have accrued at the time the further work was finished: s 1(5). As to limitation periods see LIMITATION PERIODS.

9 'Disposal' in relation to premises includes a letting, and an assignment or surrender of a tenancy, of the premises and the creation by contract of any other right to occupy them: ibid s 6(1).

10 Ibid s 3(1). Section 3 does not apply to disposals before 1974: see ss 3(2), 7(2).

11 This scheme comprises the documents listed in the House Building Standards (Approved Scheme etc) Order 1979, SI 1979/381, Schedule: art 2(1).

12 See the Defective Premises Act 1972 s 2; and BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 78. As to whether the benefit of the guarantee passes to subsequent purchasers see *Marchant v Caswell and Redgrave Ltd* (1976) 240 Estates Gazette 127 (applying the Law of Property Act 1925 s 78 (see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 566; EQUITY vol 16(2) (Reissue) PARA 618)). It might be wise for the benefit to be expressly assigned.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### 48-49 Latent defects of quality, Statutory duty as to defective premises

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(4) DISCLOSURE OF MATERIAL FACTS/ (ii) Disclosure by the Vendor/A. DEFECTS OF QUALITY/50. Disclosure by the vendor.

### 50. Disclosure by the vendor.

In special circumstances it may be the duty of the vendor to disclose matters which are known to himself, but which the purchaser has no means of discovering<sup>1</sup>, such as a defect which will render the property useless to the purchaser for the purpose for which, to the vendor's knowledge, he wishes to acquire it<sup>2</sup>; or a notice served in respect of the property, knowledge of which is essential to enable a purchaser to estimate the value<sup>3</sup>. If the vendor fails to make disclosure, he cannot obtain specific performance and may be ordered to return the deposit<sup>4</sup>.

1 See *Cook v Waugh* (1860) 2 Giff 201 at 207, where Stuart V-C said that it was a very well established doctrine that if a vendor or lessor is aware of some latent defect, and does not disclose it, the court will consider him as acting in bad faith; and Lord St Leonards treated non-disclosure of a latent defect of which the vendor was aware as preventing the contract from being binding either at law or in equity: see Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 333. This view appears to have been adopted by Joyce J in *Carlish v Salt* [1906] 1 Ch 335, relied on in *Sakkas v Donford Ltd* (1982) 46 P & CR 290 at 302 per Lord Grantchester. In its full extent, however, the obligation of disclosure exists only as regards latent defects of title: see T Cyprian Williams 'Non-disclosure, Upon the Sale of Land, of a Latent Defect Known to the Vendor' (1905-06) 50 Sol Jo 611. As regards other defects, the duty of disclosure does not arise merely out of the relation of vendor and purchaser; where it exists it arises from the special circumstances of the case, with the result that the court may either rescind the contract, or, without rescission, may refuse specific performance: see Fry *A Treatise on the Specific Performance of Contract* (6th Edn, 1921) 705. As to the return of the deposit where there is no rescission see note 4 infra.

2 See *Lucas v James* (1849) 7 Hare 410 at 418, where the character of the neighbouring houses made it impossible to use the house in question for a family residence. A similar question arose in *Hope v Walter* [1900] 1 Ch 257, CA, where the house was being used as a disorderly house by the tenant. In neither case was non-disclosure made the ground of the decision.

3 See *Carlish v Salt* [1906] 1 Ch 335 (party structure notice under London building legislation); *Beyfus v Lodge* [1925] Ch 350 (where notices to repair with schedules assessing the value of the repairs required to be done had been served under what is now the Law of Property Act 1925 s 146 (as amended) (see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 619)). In both cases the notices affected the title to the property, and it does not appear to be the law that either vendor or purchaser is bound to disclose facts material to the value unless they relate to the title (see T Cyprian Williams 'Non-disclosure, Upon the Sale of Land, of a Latent Defect Known to the Vendor' (1905-06) 50 Sol Jo 611 at 613; and *Hill v Harris* [1965] 2 QB 601, [1965] 2 All ER 358, CA), but the vendor must be careful not to make any representation or give any warranty affecting the value of

the property in the hands of the purchaser. As to other cases where a defect of quality also constituted a defect of title see *Re Puckett and Smith's Contract* [1902] 2 Ch 258, CA; *Shepherd v Croft* [1911] 1 Ch 521; *Re Belcham and Gawley's Contract* [1930] 1 Ch 56.

4 The effect of the non-disclosure may be to deprive the vendor of the special equitable relief of specific performance, but to leave the contract on foot, so that the purchaser cannot as of right recover his deposit: *Beyfus v Lodge* [1925] Ch 350 at 359 (criticised by Harpum 'Selling Without Title: A Vendor's Duty of Disclosure?' (1992) 108 LQR 280 at 328; and Harpum 'Exclusion Clauses and Contracts for the Sale of Land' [1992] 51 CLJ 263 at 300-301); *Re Scott and Alvarez's Contract, Scott v Alvarez* [1895] 2 Ch 603 at 612. However, the court can disregard this distinction and may, when it refuses specific performance, direct the return of the deposit: see the Law of Property Act 1925 s 49(2). When the result of the defect is to deprive the purchaser of the benefit of the property, or to make his enjoyment of it dependent on the payment of money which the vendor declines to pay, and there is no condition covering the defect, the purchaser is entitled to the return of the deposit: *Stevens v Adamson* (1818) 2 Stark 422; *Carlish v Salt* [1906] 1 Ch 335. As to the return of the deposit see PARAS 245-246 post.

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### 51. Misdescription or misrepresentation as to quality.

The vendor is bound to deliver to the purchaser property corresponding in extent and quality to the property which, either by the description in the contract (including any particulars of sale), or by representations of fact<sup>1</sup> made by the vendor, the purchaser expected to get. Where, owing to a misdescription, the vendor fails to perform this duty, and the misdescription, although not proceeding from fraud, is material and substantial, affecting the subject matter of the contract to such an extent that it may reasonably be supposed that, but for the misdescription, the purchaser might never have entered into the contract at all, the contract may be avoided altogether, and if there is a clause of compensation, the purchaser is not bound to resort to it<sup>2</sup>. Where a representation is true at the time when it is made, but owing to change of circumstances becomes untrue before or at the time of completion, it is the vendor's duty to disclose the change of circumstances<sup>3</sup>. However, where the discrepancy between the property as offered by the vendor and the property which, by reason of the defect, the vendor is able to hand over is not such as to alter substantially the nature of the property, then the contract is enforced subject to payment of compensation by the vendor<sup>4</sup>.

1 It is distinguished from expressions of opinion: see *Bisset v Wilkinson* [1927] AC 177, PC.

2 *Flight v Booth* (1834) 1 Bing NC 370 at 377 per Tindal CJ, where there was a substantial misdescription of leasehold property as regards permitted trades, and a condition providing compensation for errors, and rescission and recovery of the deposit was ordered. The case is stronger where the misrepresentation is made with intent to deceive and is therefore fraudulent: *Edwards v M'Leay* (1818) 2 Swan 287; *Small v Attwood* (1832) 108 ER 407 at 460 (on appeal *Attwood v Small* (1838) 6 Cl & Fin 232 at 395, HL, per Lord Lyndhurst). As to misrepresentation without fraud see PARA 42 ante. As to conditions providing against error in description see PARA 110 et seq post.

3 *With v O'Flanagan* [1936] Ch 575, CA. See also MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 750, 754, 760. In *Wales v Wadham* [1977] 2 All ER 125, [1977] 1 WLR 199, it was held in a matrimonial case that where the original statement was an honest statement of future intention never to remarry there is no duty to disclose a change of intention. However, it is difficult to see why such facts do not fall within the principle of *With v O'Flanagan* supra.

4 The rule that, in case of substantial misdescription resulting in the purchaser not getting the property he contracted for, he will not be compelled to take compensation, is known as the rule in *Flight v Booth* (1834) 1 Bing NC 370. As to the rule see *Re Davis and Cavey* (1888) 40 ChD 601 at 608; *Jacobs v Revell* [1900] 2 Ch 858 at 864; *Re Puckett and Smith's Contract* [1902] 2 Ch 258 at 264, CA; *Shepherd v Croft* [1911] 1 Ch 521 at 527; *Lee v Rayson* [1917] 1 Ch 613 at 618. As to the principle that equity will interfere and give compensation where the misdescription does not constitute a substantial difference see *Halsey v Grant* (1806) 13 Ves 73 at 77; and SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 959. As to conditions relating to compensation see PARA 110 et seq post.

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### 52. Examples of misrepresentation or misdescription as to quality.

The following have been held to be sufficient misrepresentations or misdescriptions to allow the purchaser to rescind the contract: that land is ripe for immediate development, or suitable for development, when there is a covered culvert running under it<sup>1</sup>, or where special expense must be incurred before it can be used for building<sup>2</sup>; that a farm is in a high state of cultivation<sup>3</sup>; that premises are in good repair<sup>4</sup>; that drains are in good order<sup>5</sup>; that a house is not damp<sup>6</sup>; that a farm was lately in the occupation of a particular person at a specified annual rent when in fact the farm could not possibly be let for nearly that rent, and the person had been out of possession for nearly a year and a half<sup>7</sup>; that property has been valued by a certain surveyor at a specified sum<sup>8</sup>; that the timber on a timber estate averages a certain size<sup>9</sup>; that property subject to trading restrictions has been sold as business premises<sup>10</sup>; where property held on an underlease is described as leasehold<sup>11</sup>; and where a three storey building is described as offices when planning permission has been obtained to use only part of the building for office purposes<sup>12</sup>; and where a full description of rooms in a house failed to disclose that some of the rooms were subject to a closing order<sup>13</sup>.

Where property described as shop premises was sold subject to the restrictions contained in a particular deed, so far as still subsisting, but the restrictions were not specified, although a copy of them was declared to be open to inspection and the purchaser was to be deemed to purchase with notice of them, whether or not he inspected the copy, an answer to requisitions which constituted an admission that there was a subsisting restriction on the user of the property except as private premises entitled the purchaser to refuse to complete on the ground of misdescription and to recover his deposit<sup>14</sup>.

The following are examples of misdescription where the purchaser cannot repudiate the contract but can obtain compensation: where there is a deficiency in the area of the property

agreed to be sold, but the purchaser will obtain substantially what he bargained for<sup>15</sup>; where an underground watercourse does not make the description of property as a residential property materially incorrect<sup>16</sup>; where the existence of two sewers running along one side of the premises and along the yard at the back, although materially affecting the description of the property, does not constitute a substantial difference from that agreed to be sold<sup>17</sup>.

Compensation cannot be obtained where the misdescription is collateral to the contract and is proved by the vendor to have been made with reasonable grounds for belief in its truth; in such a case the purchaser's only remedy is rescission, unless a court in its discretion awards damages in lieu of rescission<sup>18</sup>. Where a vendor makes a false representation as to a material fact, it is for him to show, if he wishes to enforce the contract, that the purchaser did not rely upon the representation<sup>19</sup>.

1 *Re Puckett and Smith's Contract* [1902] 2 Ch 258, CA.

2 *Baker v Moss* (1902) 66 JP 360.

3 *Dyer v Hargrave, Hargrave v Dyer* (1805) 10 Ves 505.

4 *Grant v Munt* (1815) Coop G 173; *Dyer v Hargrave, Hargrave v Dyer* (1805) 10 Ves 505; *Cree v Stone* (1907) Times, 10 May.

5 *Cree v Stone* (1907) Times, 10 May. In *de Lassalle v Guildford* [1901] 2 KB 215, CA, a lessee recovered damages for breach of a collateral warranty as to drains being in order, but dicta in this case as to the test for determining whether a statement amounts to a warranty were disapproved in *Heilbut, Symons & Co Ltd v Buckleton* [1913] AC 30 at 50, HL: see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 704. As to collateral warranties see CONTRACT vol 9(1) (Reissue) PARA 627.

6 *Strangways v Bishop* (1857) 29 LTOS 120.

7 *Dimmock v Hallett* (1866) 2 Ch App 21. See also *Lysney v Selby* (1705) 2 Ld Raym 1118; *Price v Macaulay* (1852) 2 De GM & G 339 (misrepresentations as to annual value); *Re Hurlbalt and Chaytor's Contract* (1888) 57 LJ Ch 421, where an honestly estimated annual value was not a misrepresentation. Cf *Re Ryan's Estate* (1868) IR 3 Eq 255.

8 *Buxton v Lister* (1746) 3 Atk 383 at 386. Cf *Abbott v Swoorder* (1851) 4 De G & Sm 448 at 457, where the vendor was held not bound to disclose a recent valuation.

9 *Lord Brooke v Rounthwaite* (1846) 5 Hare 298 at 304. Cf *Lowndes v Lane* (1789) 2 Cox Eq Cas 363.

10 *Re Davis and Cavey* (1888) 40 ChD 601; *Charles Hunt Ltd v Palmer* [1931] 2 Ch 287; *Atlantic Estates plc v Ezekiel* [1991] 2 EGLR 202, [1991] EGCS 54, CA.

11 *Re Russ and Brown's Contract* [1934] Ch 34, CA. See also *Stanton v Tattersall* (1853) 1 Sm & G 529, where a house described as '58 Pall Mall, opposite Marlborough House' had no windows or frontage towards Pall Mall and could only be approached by a narrow passage from the street; *Leyland v Illingworth* (1860) 2 De GF & J 248, where the only water on premises described as 'well supplied with water' was that obtained from the local waterworks on payment of the water rate; *Jacobs v Revell* [1900] 2 Ch 858, where title was shown to only part of the premises; and *Lee v Rayson* [1917] 1 Ch 613, where there were misrepresentations as to the leases on which freehold property consisting of several houses was let. See also PARA 45 note 7 ante. A representation of water supply on the sale plan does not necessarily entitle the purchaser to the supply: *Fewster v Turner* (1842) 11 LJ Ch 161. As to misrepresentations with regard to one lot where a purchaser has separately acquired two lots at an auction see *Holliday v Lockwood* [1917] 2 Ch 47. There can be no rescission unless the purchases in effect form one contract or the enjoyment of the one is affected by the failure to obtain the other: *Holliday v Lockwood* supra.

12 *Laurence v Lexcourt Holdings Ltd* [1978] 2 All ER 810, [1978] 1 WLR 1128, where it was also held that the contract could be rescinded on the ground of fundamental mistake (but see the criticism of this latter ground in *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932, [1994] 1 WLR 1016, CA).

13 See *Registered Holdings Ltd v Kadri* (1972) 222 Estates Gazette 621.

14 *Simmons v Pennington & Son (a firm)* [1955] 1 All ER 240, [1955] 1 WLR 183, CA.

15 *Re Fawcett and Holmes' Contract* (1889) 42 ChD 150.

16 *Shepherd v Croft* [1911] 1 Ch 521, where the vendors waived a clause in the contract excluding compensation.

17 *Re Belcham and Gawley's Contract* [1930] 1 Ch 56, following *Re Brewer and Hankins' Contract* (1899) 80 LT 127, CA, where a public sewer ran under the garden of the property, but no building on it was possible.

18 *Rutherford v Acton-Adams* [1915] AC 866, PC, as modified by the Misrepresentation Act 1967 s 2 (see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 834). See also PARA 42 ante.

19 *Redgrave v Hurd* (1881) 20 ChD 1, CA. See also *Attwood v Small* (1838) 6 Cl & Fin 232, HL; *Clapham v Shillito* (1844) 7 Beav 146; *Roots v Snelling* (1883) 48 LT 216. It is insufficient for the vendor to offer the means of verification: *Redgrave v Hurd* supra at 22-23 per Baggallay LJ; *Stanley v M'Gauran* (1882) 11 LR Ir 314 at 331, Ir CA. As to inducement as a factor in misrepresentation see generally MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 765 et seq. As to the extent to which inducement is a question of law or a question of fact see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 766.

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### 53. Misrepresentation by agent.

The principle underlying liability for misrepresentation by an agent acting in the course of his employment is that the principal and agent are one, and, subject to the qualification mentioned later<sup>1</sup>, it does not signify which of them made the misrepresentation or which of them possessed the guilty knowledge<sup>2</sup>. It follows that misrepresentation by an agent in the course of his employment has the same effect as if it were made by the principal, even though made without his knowledge or approval and whether or not made for the principal's benefit<sup>3</sup>, for an agent employed to find a purchaser has implied authority to describe the nature and the value of the property<sup>4</sup> and to state the nature of any restrictive covenants which affect it<sup>5</sup>. The purchaser must prove that either the vendor or his agent was aware of the true facts<sup>6</sup>, but, in the absence of fraud on the part of the principal, knowledge by him of facts which render false a statement made innocently by his agent does not render the principal guilty of fraudulent misrepresentation<sup>7</sup>. Misrepresentation by the agent as to the identity of his principal will vitiate the contract only where it is of importance to the other party to know with whom he is contracting, so that he would not have entered into the contract if he had known who was the agent's principal<sup>8</sup>. The principal may restrict the implied or ostensible authority which his agent would otherwise have, by bringing the restriction to the notice of the other contracting party. A misrepresentation made by the agent outside his authority as so restricted will not bind the principal<sup>9</sup>.

1 See the text and note 7 infra.

2 *S Pearson & Son Ltd v Dublin Corpn* [1907] AC 351 at 354, HL; and see AGENCY vol 1 (2008) PARA 152.



- 3 *Lloyd v Grace Smith & Co* [1912] AC 716, HL.
- 4 *Mullens v Miller* (1882) 22 ChD 194; *Smith v Land and House Property Corp* (1884) 28 ChD 7 at 13, CA.
- 5 *Richardson v Williamson and Lawson* (1871) LR 6 QB 276; *West London Commercial Bank Ltd v Kitson* (1884) 13 QBD 360, CA; *Wauton v Coppard* [1899] 1 Ch 92.
- 6 *S Pearson & Son Ltd v Dublin Corp* [1907] AC 351, HL. See also *National Exchange Co of Glasgow v Drew and Dick* (1855) 2 Macq 103 at 145-146; *Ludgater v Love* (1881) 44 LT 694, CA.
- 7 *Armstrong v Strain* [1952] 1 KB 232, [1952] 1 All ER 139, CA, approving the decision in *Gordon Hill Trust Ltd v Segall* [1941] 2 All ER 379, CA, and observations of Atkinson J in *Anglo-Scottish Beet Sugar Corp Ltd v Spalding UDC* [1937] 2 KB 607 at 625, [1937] 3 All ER 335 at 345, and criticising *London County Freehold and Leasehold Properties Ltd v Berkeley Property and Investment Co Ltd* [1936] 2 All ER 1039, CA. It is not possible to add to the innocent misstatement of an agent the fact that its falsity is known to another agent or the principal: *Armstrong v Strain* supra. However, this does not prevent its being shown that the agent made the statement without belief in its truth or recklessly, not caring whether it was true or false. It would appear, too, that fraud may be proved where a false statement is handed on by an innocent agent provided that the maker of the statement (who may be either the principal or an agent) knows that it is false and is going to be handed on. See further MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 797.
- 8 *Archer v Stone* (1898) 78 LT 34; *Nash v Dix* (1898) 78 LT 445; *Said v Butt* [1920] 3 KB 497.
- 9 *Overbrooke Estates Ltd v Glencombe Properties Ltd* [1974] 3 All ER 511, [1974] 1 WLR 1335. Such a limitation of authority is not affected by the Misrepresentation Act 1967 s 3 (as substituted) (see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 803): see *Overbrooke Estates Ltd v Glencombe Properties Ltd* supra; *Collins v Howell-Jones* (1980) 259 Estates Gazette 331, CA.

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## **B. DEFECTS OF TITLE**

### **54. Vendor's interest.**

In the absence of any indication to the contrary<sup>1</sup>, an agreement to sell land implies that the whole of the vendor's interest in the land is the subject of the agreement<sup>2</sup>, and that that interest is an estate in fee simple<sup>3</sup> free from incumbrances<sup>4</sup>, unless the purchaser had notice, before entering into the contract, that the title which the vendor was able to give was subject to limitations or incumbrances which the vendor could not remove<sup>5</sup>. Such notice does not affect the liability of a vendor who expressly agrees to show a good title if the notice can be proved only by the admission of oral evidence to contradict the written contract<sup>6</sup>.

Where the incumbrance is one (such as a registered local land charge<sup>7</sup>) of which the purchaser is deemed by statute to have actual notice<sup>8</sup>, it seems that the purchaser must complete subject to the incumbrance, even though the vendor has contracted to sell free from incumbrances<sup>9</sup>, unless the vendor himself, or his solicitor<sup>10</sup>, also has actual knowledge of the registered

charge<sup>11</sup>. However, in the case of incumbrances registered under the Land Charges Act 1972, the question of the purchaser's knowledge is to be determined without reference to the statutory provision<sup>12</sup> which deems him to have actual notice<sup>13</sup>, and where an innocent purchaser would in such a case have a remedy against the vendor, any provision of the contract is void so far as it purports to exclude or restrict the purchaser's remedy<sup>14</sup>.

1 If the vendor has sold only such estate and interest as he has in the land, this is all that he can be required to transfer. Hence, if at the date of a lease land is subject to a mortgage, and the lease contains an option for the lessee to purchase for a specified sum all the lessor's estate and interest at the date of the lease, the option extends only to the equity of redemption, and, in exercising the option, the lessee cannot require the lessor to pay off the mortgage: *Fowler v Willis* [1922] 2 Ch 514. As to the distinction between the subject matter of the sale (ie what the vendor has agreed to sell) and the vendor's duty to prove a good title to the sale see *Barclay's Bank plc v Weeks Legg & Dean (a firm)* [1998] 3 All ER 213 at 221-222, [1998] 3 WLR 656 at 666-668, CA, per Millett J.

2 *Bower v Cooper* (1843) 2 Hare 408. On the sale of a leasehold the fact that the vendor's interest has been forfeited before contract entitles the purchaser to treat the contract as repudiated: *Pips (Leisure Productions) Ltd v Walton* (1980) 43 P & CR 415.

3 *Hughes v Parker* (1841) 8 M & W 244; *Cox v Middleton* (1854) 2 Drew 209 at 216.

4 *Phillips v Caldcleugh* (1868) LR 4 QB 159; *Cato v Thompson* (1882) 9 QBD 616, CA.

5 *Cowley v Watts* (1853) 17 Jur 172; *Cox v Middleton* (1854) 2 Drew 209 at 216 per Kindersley V-C; *Re Gloag and Miller's Contract* (1883) 23 ChD 320 at 327 per Fry J; *Ellis v Rogers* (1885) 29 ChD 661, CA; *Timmins v Moreland Street Property Co Ltd* [1958] Ch 110 at 132, [1957] 3 All ER 265 at 277, CA. Evidence of the purchaser's knowledge of an incurable defect of title cannot be given on an inquiry as to title under a vendor's order for specific performance; such evidence can be given only at the trial: *McGrory v Alderdale Estate Co Ltd* [1918] AC 503, HL.

6 *Cato v Thompson* (1882) 9 QBD 616, CA; *Re Gloag and Miller's Contract* (1883) 23 ChD 320. Even if the purchaser agrees to accept a defective title, the vendor is not entitled to have the usual covenants for title restricted: *Re Geraghty and Lyon's Contract* (1919) 53 ILT 57.

7 Registration will be under the Local Land Charges Act 1975: see LAND CHARGES vol 26 (2004 Reissue) PARA 671 et seq. As to the making of pre-contract searches for such charges see PARA 13 ante.

8 Ie under the Law of Property Act 1925 s 198(1) (as amended): see LAND CHARGES vol 26 (2004 Reissue) PARA 616. See also EQUITY vol 16(2) (Reissue) PARA 576 et seq.

9 *Re Forsey and Hollebone's Contract* [1927] 2 Ch 379 at 387, obiter, per Eve J (not considered on appeal at [1927] 2 Ch 387, CA), criticised by Millett J in *Rignall Developments Ltd v Halil* [1988] Ch 190 at 194, 203, [1987] 3 All ER 170 at 172, 178. See also PARA 123 note 5 post.

10 See PARA 3 ante.

11 See *Rignall Developments Ltd v Halil* [1988] Ch 190, [1987] 3 All ER 170.

12 Ie the Law of Property Act 1925 s 198(1) (as amended): see LAND CHARGES vol 26 (2004 Reissue) PARA 616. See also EQUITY vol 16(2) (Reissue) PARA 576 et seq.

13 Law of Property Act 1969 s 24(1); Land Charges Act 1972 s 18(6). For this purpose the knowledge acquired in the course of a transaction by a person who is acting in it as counsel or as solicitor or other agent for another is to be treated as knowledge of the other: Law of Property Act 1969 s 24(4).

14 See *ibid* s 24(2).

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relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

## **54 Vendor's interest**

NOTE 12--Now the reference is to the Land Registration Act 2002 (see LAND REGISTRATION): Law of Property Act 1969 s 24(1) (amended by the Land Registration Act 2002 Sch 11 para 9).

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## **55. Vendor's duty to disclose defects of title.**

Since a vendor's title to land is exclusively within his own knowledge, he is bound to disclose all latent defects in his title to an intending purchaser. If a purchaser subsequently becomes aware of an irremovable defect of title<sup>1</sup> which the vendor did not disclose to him before entering into the contract, he may rescind the contract<sup>2</sup> or resist its specific performance on that ground, even though the vendor may have sought to protect himself by imposing misleading conditions as to the title or proof of title to which the purchaser is entitled<sup>3</sup>. Whether the sale is made by auction or by private treaty, the purchaser is under no obligation to make inquiry as to defects in the vendor's title, but it is the vendor's duty to disclose all that is necessary for his own protection<sup>4</sup>. The vendor's disclosure should be frank and full, and it is not sufficient for him to make ambiguous or misleading statements<sup>5</sup>. If he wishes to prevent a purchaser from objecting to a defect he must do so in plain terms, stating clearly the exact nature of the defect to which the purchaser is not to make objection<sup>6</sup>.

The Standard Conditions of Sale now in general use limit the vendor's duty of disclosure<sup>7</sup> by providing that the property is sold subject to the following incumbrances<sup>8</sup>: (1) those mentioned in the agreement<sup>9</sup>; (2) those discoverable by inspection of the property before the contract<sup>10</sup>; (3) those the vendor does not and could not know about; (4) entries made before the date of the contract in any public register except those maintained by Her Majesty's Land Registry<sup>11</sup> or its Land Charges Department<sup>12</sup> or by Companies House<sup>13</sup>; (5) any public requirements<sup>14</sup>.

In certain cases the contract is deemed to extend beyond the vendor's actual interest. If the vendor of a mortgage term has power to transfer the fee simple, or, in the case of a mortgage sub-term, the leasehold reversion, the contract is deemed to extend to the fee simple or the leasehold reversion<sup>15</sup>. If the vendor of an equitable interest capable of existing as a legal estate has power to vest, or to require to be vested, such a legal estate in himself or in the purchaser<sup>16</sup>, the contract is deemed to extend to the legal estate<sup>17</sup>. If the vendor of an entailed interest in possession has power to vest or to require to be vested in himself or in the purchaser the fee simple (or if the entailed interest is an interest in a term of years absolute, the term), the contract is deemed to extend to the fee simple or the term of years absolute<sup>18</sup>.

1 As to the distinction between removable and irremovable defects see PARA 44 ante; and as to the position with regard to defects of which the purchaser is by statute deemed to have actual notice see PARA 54 ante.

2 See *Peyman v Lanjani* [1985] Ch 457 at 496-497, [1984] 3 All ER 703 at 731, CA, where this passage was cited with approval by Slade LJ. See also PARAS 44 ante, 57, 174-176 post.

3 See eg *Heywood v Mallalieu* (1883) 25 ChD 357; *Nottingham Patent Brick and Tile Co v Butler* (1886) 16 QBD 778, CA (applied in *Rignall Developments Ltd v Halil* [1988] Ch 190, [1987] 3 All ER 170); *Re Haedicke and Lipski's Contract* [1901] 2 Ch 666; *Becker v Partridge* [1966] 2 QB 155, [1966] 2 All ER 266, CA.

4 *Reeve v Berridge* (1888) 20 QBD 523 at 528, CA; *Re White and Smith's Contract* [1896] 1 Ch 637 at 643. See also dicta in *Carlish v Salt* [1906] 1 Ch 335 at 341. See also *Wilson v Allen* (1820) 1 Jac & W 611 at 623 per Plumer MR; *Flood v Pritchard* (1879) 40 LT 873 at 875 per Fry J; *Brewer v Brown* (1884) 28 ChD 309; *Dougherty v Oates* (1900) 45 Sol Jo 119. If, on a sale of registered land, the title is possessory only, this should be disclosed before the contract: *Re Brine and Davies' Contract* [1935] Ch 388; and see LAND REGISTRATION vol 26 (2004 Reissue) PARA 837.

5 *Baskcomb v Beckwith* (1869) LR 8 Eq 100 at 109; *Re Banister, Broad v Munton* (1879) 12 ChD 131 at 136 per Fry J (on appeal (1879) 12 ChD 131); *Re Marsh and Earl Granville* (1882) 24 ChD 11 at 15 per Fry J. See also MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 749-750.

6 As to misleading conditions see PARA 83 post.

7 See the Standard Conditions of Sale (3rd Edn); and PARA 1 note 9 ante. As to the duty of the purchaser to satisfy himself as to incumbrances and the vendor's duty of disclosure see *Celsteel Ltd v Alton House Holdings Ltd (No 2)* [1986] 1 All ER 598 at 607 (not reported on this point at [1986] 1 WLR 666); affd [1987] 2 All ER 240, [1987] 1 WLR 291, CA (not mentioning the point).

8 See the Standard Conditions of Sale (3rd Edn), conditions 3.1.1-3.1.2.

9 'Agreement' means the contractual document which incorporates these conditions, with or without amendment: Standard Conditions of Sale (3rd Edn), condition 1.1.1(b).

10 'Contract' means the bargain between the vendor and the purchaser of which these conditions, with or without amendment, form part: Standard Conditions of Sale (3rd Edn), condition 1.1.1(f).

11 As to Her Majesty's Land Registry see LAND REGISTRATION vol 26 (2004 Reissue) PARA 1064.

12 As to Her Majesty's Land Charges Department see LAND CHARGES vol 26 (2004 Reissue) PARA 602.

13 As to registration of charges at Companies House see COMPANIES vol 15 (2009) PARA 1295 et seq.

14 Standard Conditions of Sale (3rd Edn), condition 3.1.2(a)-(e). 'Public requirement' means any notice, order or proposal given or made (whether before or after the date of the contract) by a body acting on statutory authority: condition 1.1.1(j).

15 Law of Property Act 1925 s 42(4)(i).

16 'Purchaser' means a purchaser in good faith for valuable consideration and includes a lessee, mortgagee or other person who for valuable consideration acquires an interest in property except that in ibid Pt I (ss 1-39) (as amended) and elsewhere where so expressly provided 'purchaser' only means a person who acquires an interest in or charge on property for money or money's worth; and in reference to a legal estate includes a chargee by way of legal mortgage; and where the context so requires 'purchaser' includes an intending purchaser; 'purchase' has a meaning corresponding with that of 'purchaser'; and 'valuable consideration' includes marriage but does not include a nominal consideration in money: s 205(1)(xxi).

17 Ibid s 42(4)(ii).

18 Ibid s 42(4)(iii). See also *Elliott and H Elliott (Builders) Ltd v Pierson* [1948] Ch 452, [1948] 1 All ER 939, where the vendor, who controlled a company as shareholder and sole director, contracted to sell the fee simple when he had only a leasehold interest in the land, the fee simple being vested in the company. The purchaser, on discovering these facts, purported to repudiate, but it was held that, as the vendor could compel the company to transfer, he could obtain specific performance.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

## 55 Vendor's duty to disclose defects of title

NOTE 16--Law of Property Act 1925 s 205(1)(xxi) amended: Civil Partnership Act 2004 Sch 27 para 7.

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## 56. Purchaser's remedies.

The vendor's duty to disclose is absolute, and his ignorance of the defect is no excuse<sup>1</sup>. If the defect is substantial the purchaser may repudiate or obtain specific performance with a reduction in the price<sup>2</sup>, whereas the vendor cannot enforce the contract<sup>3</sup>. If the defect is not substantial, the purchaser's remedy is in damages, and the vendor can enforce the contract but with a reduction in the price<sup>4</sup>. If the vendor with intent to defraud conceals from the purchaser any instrument or incumbrance material to the title<sup>5</sup>, or falsifies any pedigree upon which the title may depend<sup>6</sup>, he commits a criminal offence<sup>7</sup> and is also liable to the purchaser in damages<sup>8</sup>.

1 *Re Brewer and Hankins' Contract* (1899) 80 LT 127, CA. Cf the provisions in the Standard Conditions of Sale (3rd Edn): see PARA 55 ante. As to the Standard Conditions of Sale see PARA 1 note 9 ante. There are circumstances in which the vendor's knowledge may be material; for example his knowledge may preclude the vendor from relying on a condition of sale covering the defect and entitle the purchaser to rescind (*Re Banister, Broad v Munton* (1879) 12 ChD 131, CA; *Nottingham Patent Brick and Tile Co v Butler* (1886) 16 QBD 778, CA (applied in *Rignall Developments Ltd v Halil* [1988] Ch 190, [1987] 3 All ER 170); and the vendor's knowledge may preclude him from relying on a condition of sale permitting rescission where requisitions are persisted in (see eg *Baines v Tweddle* [1959] Ch 679, [1959] 2 All ER 724, CA; and PARA 104 post). See also *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932, [1994] 1 WLR 1016, CA.

2 *Rudd v Lascelles* [1900] 1 Ch 815.

3 *Phillips v Caldwell* (1868) LR 4 QB 159.

4 *Re Brewer and Hankins' Contract* (1899) 80 LT 127, CA; *Re Belcham and Gawley's Contract* [1930] 1 Ch 56.

5 See the Law of Property Act 1925 s 183(1)(a); and PARA 149 post.

6 See *ibid* s 183(1)(b); and PARA 149 post.

7 See *ibid* s 183(1); para 149 post; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 318. No prosecution under s 183 can be commenced without the leave of the Attorney General: s 183(4). Notice of any application for leave to prosecute must be given to the person intended to be prosecuted: s 183(5).

8 See *ibid* s 183(2); and PARA 149 post. In estimating the amount of damages where property is recovered from the purchaser, regard must be had to any expenditure by him in improvements of the land: s 183(3). The action for damages lies only on proof of an intent to defraud: *District Bank Ltd v Luigi Grill Ltd* [1943] Ch 78, [1943] 1 All ER 136.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information

relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(4) DISCLOSURE OF MATERIAL FACTS/ (ii) Disclosure by the Vendor/B. DEFECTS OF TITLE/57. What amounts to a defect of title.

## 57. What amounts to a defect of title.

Any fact calculated to prevent the purchaser obtaining such a title to the property as he was led to expect constitutes a defect of title<sup>1</sup>. The following are examples of defects of title: where title is to be shown for less than the full statutory period<sup>2</sup>, the fact that the deed forming the stipulated root of title is a voluntary one upon which ordinarily there would not have been an investigation of the title<sup>3</sup>; the existence or alleged existence of an easement over the property<sup>4</sup>, or of covenants restricting its use and enjoyment<sup>5</sup>; in the case of leasehold property, the onerous or unusual nature of the covenants in the lease under which the property is held<sup>6</sup>; the existence of restrictions as to the use for certain trades of premises described as leasehold business premises<sup>7</sup>, or of a covenant to expend a specified sum in building within a limited time on land described in general terms as freehold building land<sup>8</sup>, or of a party wall notice<sup>9</sup>, and an award made under it imposing a pecuniary liability on the owner of the property sold<sup>10</sup>. Similarly, it is a defect of title if the maxim *cuius est solum eius est usque ad coelum et ad inferos*<sup>11</sup> is not applicable to the property sold owing to the vendor's title not extending to an underground cellar<sup>12</sup> or to the subjacent minerals<sup>13</sup>, or owing to a third person having a right to overhang part of the property<sup>14</sup>. All such matters must be disclosed by the vendor<sup>15</sup>.

On the other hand, a vendor has been held to have shown a good title despite failing to disclose a contract for the sale of the land made some 60 years earlier<sup>16</sup>.

1 See *Denne v Light* (1857) 8 De GM & G 774, where it appeared uncertain whether any means of entering at all times upon the piece of agricultural land agreed to be sold would be conferred upon the purchaser; *Langford v Selmes* (1857) 3 K & J 220 at 225, 229 per Page Wood V-C, where the purchaser of freehold ground rents would not have been able to employ the ordinary remedies for their recovery. Cf *Stanton v Tattersall* (1853) 1 Sm & G 529; and see PARA 52 note 11 ante.

2 I.e 15 years: see PARA 139 post.

3 *Re Marsh and Earl Granville* (1883) 24 ChD 11, CA.

4 *Heywood v Mallalieu* (1883) 25 ChD 357; *Yandle & Sons v Sutton* [1922] 2 Ch 199. Cf *Burnell v Brown* (1820) 1 Jac & W 168 at 172 (undisclosed reservation of right of sporting); *Gibson v Spurrier* (1795) Peake Add Cas 49 (right of common); *Shackleton v Sutcliffe* (1847) 1 De G & Sm 609 (easement of watercourse).

5 *Nottingham Patent Brick and Tile Co v Butler* (1886) 16 QBD 778, CA. See also *Bristow v Wood* (1844) 1 Coll 480; *Phillips v Caldcleugh* (1868) LR 4 QB 159; *Re Judge and Sheridan's Contract* (1907) 96 LT 451; *Pemsel and Wilson v Tucker* [1907] 2 Ch 191 (covenant with neighbour not to do anything to prejudice the right of light to respective properties); *Re Stone and Saville's Contract* [1963] 1 All ER 353, [1963] 1 WLR 163, CA; and cf *Andrew v Aitken* (1882) 22 ChD 218; *Cato v Thompson* (1882) 9 QBD 616, CA. Restrictive covenants (other than covenants between lessor and lessee) entered into after 1925 are registrable as land charges (see LAND CHARGES vol 26 (2004 Reissue) PARA 635), and the registration of a restrictive covenant as a land charge constitutes actual notice to all the world (see the Law of Property Act 1925 s 198(1) (as amended); and LAND CHARGES vol 26 (2004 Reissue) PARA 616; see also EQUITY vol 16(2) (Reissue) PARA 576 et seq). Failure to register makes the contract void against a purchaser of the legal estate for money or money's worth: see the Land Charges Act 1972 s 4(6) (as amended); and LAND CHARGES vol 26 (2004 Reissue) PARA 643. If the agreement states that any part of the property is sold subject to a lease, the purchaser is to indemnify the vendor against all claims arising from the lease after actual completion; this includes claims which are unenforceable against a purchaser for want of registration: Standard Conditions of Sale (3rd Edn), conditions 3.3.1, 3.3.2(d). For the meaning of 'agreement' see PARA 55 note 9 ante. 'Lease' includes sub-lease, tenancy and agreement for a lease or sub-lease: condition 1.1.1(h). If after completion the vendor will remain bound by any obligation affecting the

property, but the law does not imply any covenant by the purchaser to indemnify the vendor against liability for future breaches of it, the purchaser is to covenant in the transfer to indemnify the vendor against liability for any future breach of the obligation and to perform it from then on: condition 4.5.4(a). As to the Standard Conditions of Sale see PARA 1 note 9 ante.

6 *Reeve v Berridge* (1888) 20 QBD 523, CA; see PARA 60 post; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 84.

7 *Re Davis and Cavey* (1888) 40 ChD 601; *Charles Hunt Ltd v Palmer* [1931] 2 Ch 287; *Atlantic Estates plc v Ezekiel* [1991] 2 EGLR 202, [1991] EGCS 54, CA.

8 *Dougherty v Oates* (1900) 45 Sol Jo 119.

9 See *Carlsh v Salt* [1906] 1 Ch 335. As to party wall notices see BOUNDARIES.

10 *Carlsh v Salt* [1906] 1 Ch 335; but cf *Re Leyland and Taylor's Contract* [1900] 2 Ch 625, CA, where a notice was served on the vendor by the local highways authority, requiring him to make up a private street. He did not disclose the notice, but the work was not executed or the expense incurred until after completion of the purchase. As to a dormant order for closing a street see *Barnes v Cadogan Developments Ltd* [1930] 1 Ch 479.

11 See MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 20 et seq; REAL PROPERTY vol 39(2) (Reissue) PARA 76.

12 *Whittington v Corder* (1852) 16 Jur 1034.

13 *Upperton v Nickolson* (1871) 6 Ch App 436 at 444; *Bellamy v Debenham* [1891] 1 Ch 412, CA. Cf *Seaman v Vawdrey* (1810) 16 Ves 390; *Ramsden v Hurst* (1858) 27 LJ Ch 482.

14 *Pope v Garland* (1841) 4 Y & C Ex 394 at 403. Cf *Laybourn v Gridley* [1892] 2 Ch 53.

15 If the vendor states the effect of a deed, he is bound by his statement; if instead of doing so he offers the deed for inspection the risk is on the purchaser: *Cox v Coventon* (1862) 31 Beav 378 at 388.

16 See *MEPC Ltd v Christian-Edwards* [1981] AC 205, [1979] 3 All ER 752, HL.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(4) DISCLOSURE OF MATERIAL FACTS/ (ii) Disclosure by the Vendor/B. DEFECTS OF TITLE/58. Existing tenancies.

### 58. Existing tenancies.

In the absence of an intimation to the contrary, a purchaser is entitled to assume that property offered for sale is in hand, so that he will obtain possession of the property on completion<sup>1</sup>; consequently, any existing lease or tenancy must be mentioned in the particulars or referred to in the agreement for sale<sup>2</sup>. The information as to past or existing tenancies must not be misleading<sup>3</sup>, for example by stating the rent paid by the last tenant and implying, contrary to the fact, that a similar rent can be obtained at the time of the sale<sup>4</sup>, or by stating the existing tenancies without mentioning that the tenants have given notice to quit<sup>5</sup>, or by stating that the property is sold with the benefit of leases containing certain covenants without stating that the covenants are not enforceable<sup>6</sup>. On a sale of agricultural land subject to a tenancy, where

particulars of the tenancy are given, the fact that the tenant has made improvements which will entitle him to compensation need not be specifically mentioned<sup>7</sup>.

1 As to vacant possession see PARA 123 post.

2 *Hughes v Jones* (1861) 3 De GF & J 307; *Edwards v Wickwar* (1865) LR 1 Eq 68; *Cook v Taylor* [1942] Ch 349 at 352, [1942] 2 All ER 85 at 87; *Re Crosby's Contract, Crosby v Houghton* [1949] 1 All ER 830. Cf *Royal Bristol Permanent Building Society v Bomash* (1887) 35 ChD 390 at 394, where, on a sale by mortgagees, the mortgagor was in possession at the time fixed for completion and remained so until turned out by the sheriff more than a month later.

3 *Lachlan v Reynolds* (1853) Kay 52; *Farebrother v Gibson* (1857) 1 De G & J 602; *Swaishland v Dearsley* (1861) 29 Beav 430; *Re Edwards to Daniel Sykes & Co Ltd* (1890) 62 LT 445; and see *Lee v Rayson* [1917] 1 Ch 613, where an inaccurate statement was made as to the ground rents of leases affecting a number of freehold houses. A certificate of disrepair and consequent abatement of rent must be disclosed: *Re Englefield Holdings Ltd and Sinclair's Contract* [1962] 3 All ER 503, [1962] 1 WLR 1119; but see the Standard Conditions of Sale (3rd Edn) which provide that if the agreement states that any part of the property is sold subject to a lease, the vendor takes no responsibility for what rent is lawfully recoverable, nor for whether or how any legislation affects the lease: condition 3.3.2(e). For the meaning of 'agreement' see PARA 55 note 9 ante; and for the meaning of 'lease' see PARA 57 note 5 ante. As to the Standard Conditions of Sale see PARA 1 note 9 ante.

4 *Dimmock v Hallett* (1866) 2 Ch App 21: see PARA 52 text and note 7 ante.

5 *Dimmock v Hallett* (1866) 2 Ch App 21 at 28, 30. See also *Re Englefield Holdings Ltd and Sinclair's Contract* [1962] 3 All ER 503 at 505, [1962] 1 WLR 1119 at 1122 per Pennycuik J; and *Pagebar Properties Ltd v Derby Investment Holdings Ltd* [1973] 1 All ER 65 at 68, [1972] 1 WLR 1500 at 1503 per Goulding J.

6 *Flint v Woodin* (1852) 9 Hare 618 at 621.

7 *Re Earl of Derby and Fergusson's Contract* [1912] 1 Ch 479: see AGRICULTURAL LAND vol 1 (2008) PARA 366. As to conditions as to the payment of the outgoing tenant's valuation see PARA 89 post.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

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### 59. Leasehold property.

Where the subject matter of the contract is a leasehold interest, the vendor must make it clear whether the interest he is selling is created by an original lease or an underlease<sup>1</sup>, although it does not appear to be material to distinguish between an underlease and a sub-underlease<sup>2</sup>. Where the premises sold are held under a lease comprising other property<sup>3</sup>, or are held by underlease derived from a head lease which comprises other property<sup>4</sup>, these are material facts which must be disclosed<sup>5</sup>. Further, where the lease contains the usual covenant to deliver up in repair at the expiration of the term, and part of the demised buildings has been demolished<sup>6</sup>, or where underleases have been granted not containing the same covenants as the head lease under which the interest agreed to be sold is derived<sup>7</sup>, these facts must be stated. A rent review notice served by the lessor must be disclosed<sup>8</sup>.



1 *Madeley v Booth* (1848) 2 De G & Sm 718; *Henderson v Hudson* (1867) 15 WR 860; *Re Beyfus and Masters's Contract* (1888) 39 ChD 110, CA. See also *Hayford v Criddle* (1855) 22 Beav 477 at 480 per Romilly MR; *Brumfit v Morton* (1857) 3 Jur NS 1198 at 1200 per Stuart V-C; *Flood v Pritchard* (1879) 40 LT 873; and cf *Bartlett v Salmon* (1855) 6 De GM & G 33; *Camberwell and South London Building Society v Holloway* (1879) 13 ChD 754; *Waring v Scotland* (1888) 57 LJ Ch 1016; *Re Russ and Brown's Contract* [1934] Ch 34, CA; *Cunningham v Shackleton* (1935) 79 Sol Jo 381. In *Jones v Rimmer* (1880) 14 ChD 588, CA, on a sale of leaseholds held under a corporation which usually reserved only a nominal rent, no mention of the ground rent in fact payable was made, and the purchaser was held entitled to be discharged. Where a head lease has been disclaimed on bankruptcy, an underlease of part of the property comprised in it can still be properly described as an underlease: *Re Thompson and Cottrell's Contract* [1943] Ch 97, [1943] 1 All ER 169.

2 *Becker v Partridge* [1966] 2 QB 155 at 170, [1966] 2 All ER 266 at 270, CA, per Danckwerts LJ.

3 *Sheard v VENABLES* (1867) 36 LJ Ch 922. Cf *Tomkins v White* (1806) 3 Smith KB 435; *Warren v Richardson* (1830) You 1; *Leuty v Hillas* (1858) 2 De G & J 110 at 122 per Lord Cranworth LC. See also *Re Boulton and Cullingford's Contract* (1893) 37 Sol Jo 248, CA, where six houses, in fact held under one lease at a rent of £24, were described as held at ground rents of £4 each.

4 *Darlington v Hamilton* (1854) Kay 550 at 558; *Creswell v Davidson* (1887) 56 LT 811; *Re Lloyds Bank Ltd, and Lillington's Contract* [1912] 1 Ch 601. See also *Taylor v Martindale* (1842) 1 Y & C Ch Cas 658.

5 Such disclosure may not be necessary where the property sold is part of a house and it is obvious that the whole of the house would almost certainly be comprised in a head lease: *Becker v Partridge* [1966] 2 QB 155, [1966] 2 All ER 266, CA.

6 *Granger v Worms* (1814) 4 Camp 83. Cf *Re Taunton and West of England Perpetual Benefit Building Society and Roberts' Contract* [1912] 2 Ch 381. See also *Re Martin, ex p Dixon (Trustee) v Tucker* (1912) 106 LT 381, where it was held that a lessee who has rendered his lease liable to forfeiture by a continuing breach of covenant cannot make a good title under an open contract even though the landlord has accepted the rent; *Pips (Leisure Productions) Ltd v Walton* (1982) 43 P & CR 415. As to the performance of leasehold covenants see PARAS 98-99 post.

7 *Waring v Hoggart* (1824) Ry & M 39; *Darlington v Hamilton* (1854) Kay 550 at 559. As to a statutory duty to give certain information about a subtenancy derived out of a tenancy extended under the Leasehold Reform Act 1967 see s 16(6), (8); and LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1483.

8 See *F and H Entertainments Ltd v Leisure Entertainment Ltd* (1976) 120 Sol Jo 331, 240 Estates Gazette 455.

## UPDATE

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Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(4) DISCLOSURE OF MATERIAL FACTS/ (ii) Disclosure by the Vendor/B. DEFECTS OF TITLE/60. Unusual covenants in leases.

### 60. Unusual covenants in leases.

Where leasehold property is held subject to any onerous or unusual covenants<sup>1</sup>, the vendor must either disclose to the purchaser their existence and nature or give him a reasonable opportunity of inspecting the lease or other document containing the covenants before he enters into the contract<sup>2</sup>. A stipulation in the contract that the vendor's title is accepted does

not enable a vendor to compel a purchaser to complete the contract where neither of these courses has been taken<sup>3</sup>. The question whether in any particular case the vendor has given the purchaser such a reasonable opportunity of inspection as to discharge the duty of disclosure is one of fact<sup>4</sup>.

1 As to unusual covenants see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 84.

2 *Reeve v Berridge* (1888) 20 QBD 523, CA; *Re White and Smith's Contract* [1896] 1 Ch 637; *Re Haedicke and Lipski's Contract* [1901] 2 Ch 666; *Molyneux v Hawtrey* [1903] 2 KB 487, CA. A covenant by the lessee to pay the costs and expenses of a notice prior to re-entry for a forfeiture under the Law of Property Act 1925 s 146 (as amended) (see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 619), is an onerous covenant in the case of a new house let for a long term at a moderate ground rent: *Allen v Smith* [1924] 2 Ch 308. As to what are usual covenants in a lease see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 83; and cf *Jones v Edney* (1812) 3 Camp 285, where leasehold premises were described as a 'free public house'; the auctioneer read over the lease at the auction, including a covenant making the premises a tied house, but said that the covenant was not enforceable, and the purchaser was entitled to rescission. See also *Flight v Booth* (1834) 1 Bing NC 370; *Bentley v Craven* (1853) 17 Beav 204, where the lease did not in fact contain a restriction stated in the particulars, and an order for completion was refused until the result of a suit to rectify the lease by introducing the restriction was known.

3 *Re Haedicke and Lipski's Contract* [1901] 2 Ch 666; *Becker v Partridge* [1966] 2 QB 155, [1966] 2 All ER 266, CA; and see PARA 94 post.

4 *Cosser v Collinge* (1832) 3 My & K 283; *Brumfit v Morton* (1857) 3 Jur NS 1198 at 1202 per Stuart V-C; *Hyde v Warden* (1877) 3 Ex D 72 at 80, CA; *Bank of Ireland v Brookfield Linen Co* (1884) 15 LR Ir 37; *Dougherty v Oates* (1900) 45 Sol Jo 119 at 120, where Buckley J said that a man had not a fair opportunity of ascertaining the contents of deeds if he came into the auction room not even knowing that the deeds existed; *Molyneux v Hawtrey* [1903] 2 KB 487, CA; *Re Childe and Hodgson's Contract* (1905) 54 WR 234. A condition which refers to a particular document and offers inspection of it is not misleading unless it refers to it in such a way as to lead to the belief that everything material to the title is disclosed and nothing further is to be learnt on inspection which is not, in fact, the case: *Blenkhorn v Penrose* (1880) 43 LT 668. In *Simmons v Pennington & Son (a firm)* [1955] 1 All ER 240, [1955] 1 WLR 183, CA, property was sold as shop premises although it was subject to a restrictive covenant which prohibited use otherwise than as a private dwelling house; a provision that a copy of the covenants could be inspected at the offices of the vendor's solicitors or at the auction room, and that the purchaser whether or not he inspected them should be deemed to purchase with full notice of them, did not prevent the purchaser from repudiating when a requisition stated that the covenant was still subsisting.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(4) DISCLOSURE OF MATERIAL FACTS/(ii) Disclosure by the Vendor/B. DEFECTS OF TITLE/61. Matters which need not be disclosed.

#### 61. Matters which need not be disclosed.

The vendor need not specifically disclose matters which are necessarily incidental to his tenure of the property<sup>1</sup>. Thus statutory security of tenure conferred on various categories of lessees is not a matter for disclosure<sup>2</sup>. On a sale of mines and minerals, any rights of mining under the local customs of the mining district<sup>3</sup> need not be stated, as such customs are notorious<sup>4</sup>. It is unnecessary to disclose matters which will not affect the purchaser<sup>5</sup>, but disclosure must be

made where the vendor will remain personally liable and requires the purchaser to enter into an indemnity covenant<sup>6</sup>.

1 *Hayford v Criddle* (1855) 22 Beav 477 at 480 per Romilly MR.

2 For example, rights under the Landlord and Tenant Act 1954 (see LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 701 et seq), the Rent Act 1977 (see LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 808 et seq), the Housing Act 1988 (see generally HOUSING), the Leasehold Reform Act 1967 (see LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1389 et seq), the Landlord and Tenant Act 1987 (see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 5), the Leasehold Reform (Housing and Urban Development) Act 1993 (see generally HOUSING (2006 Reissue) PARAS 308, 309), and the Rent (Agriculture) Act 1976 (see LANDLORD AND TENANT vol 27(2) (2006 Reissue) PARA 1134 et seq). As to inquiries about such rights see PARA 8 ante.

3 As to such local customs see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 586 et seq. As to the vesting of coal in the Coal Authority see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 67 et seq.

4 Cf *Hayford v Criddle* (1855) 22 Beav 477 at 480. The existence of undisclosed quit rents on the property, being incidents of tenure, is a subject for compensation, not a ground for rescission: see *Esdale v Stephenson* (1822) 1 Sim & St 122 at 124. As to the extinction of quit rents see generally CUSTOM AND USAGE.

5 *Smith v Colbourne* [1914] 2 Ch 533. An example would be a restrictive covenant already defeated by the vendor through lack of notice: *Wilkes v Spooner* [1911] 2 KB 473, CA. The same principle would apply to a covenant defeated for non-registration under the Land Charges Act 1972: see LAND CHARGES vol 26 (2004 Reissue) PARA 643.

## UPDATE

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(4) DISCLOSURE OF MATERIAL FACTS/(iii) Disclosure by the Purchaser/62. Purchaser's duty generally.

### (iii) Disclosure by the Purchaser

#### 62. Purchaser's duty generally.

A purchaser is under no obligation to disclose to the vendor any fact known to him and not to the vendor which enhances, or appears to the purchaser to enhance, the value of the property<sup>1</sup>. Although simple reticence does not amount to fraud, yet, if the purchaser by any act or word induces the vendor to believe in the existence of a non-existent fact<sup>2</sup>, or if he attempts to hurry the vendor into a contract without giving him an opportunity to ascertain the value of the property<sup>3</sup>, a court of equity may refuse to order specific performance of the contract at the suit of the purchaser; and the same consequence follows where a purchaser makes false statements of fact which discourage other possible purchasers from competing with him for the property<sup>4</sup>.

1 Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 5; *Fox v Mackreth*, *Pitt v Mackreth* (1788) 2 Bro CC 400 at 419 per Lord Thurlow LC; *Turner v Harvey* (1821) Jac 169 at 178; *Walters v Morgan* (1861) 3 De GF & J 718; *Coaks v Boswell* (1886) 11 App Cas 232 at 235, HL, per Lord Selborne. A purchaser of mines who by trespassing has abstracted some of the property must disclose this fact: *Phillips v Homfray*, *Fothergill v Phillips* (1871) 6 Ch App 770 at 779 per Lord Hatherley LC; and see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 751.

2 See the cases cited in note 1 supra. 'A single word, or (I may add) a nod or a wink, or a shake of the head, or a smile from the purchaser, intended to induce the vendor to believe the existence of a non-existent fact, which might influence the price of the subject to be sold, would be sufficient ground for a court of equity to refuse a decree for a specific performance of the agreement': *Walters v Morgan* (1861) 3 De GF & J 718 at 724 per Lord Campbell LC. See also *Davis v London and Provincial Marine Insurance Co* (1878) 8 ChD 469; *Davies v Ohrlly* (1898) 14 TLR 260; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 751. As to specific performance generally see SPECIFIC PERFORMANCE.

3 See *Walters v Morgan* (1861) 3 De GF & J 718 at 724 per Lord Campbell LC. Cf *Vernon v Keys* (1810) 12 East 632 at 638 (affd (1812) 4 Taunt 488, Ex Ch), where a purchaser represented that he was buying on behalf of himself and others who would not consent to his offering more than a certain figure.

4 Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 5; *Howard v Hopkyns* (1742) 2 Atk 371. Cf *Fuller v Abrahams* (1821) 3 Brod & Bing 116. As to an action for slander of title see LIBEL AND SLANDER vol 28 (Reissue) PARA 274 et seq.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(4) DISCLOSURE OF MATERIAL FACTS/(iii) Disclosure by the Purchaser/63. Purchaser's duty arising out of fiduciary relationship.

### 63. Purchaser's duty arising out of fiduciary relationship.

Where, during the course of negotiations for the sale and purchase of property, the proposed purchaser, in the name of and purportedly as agent on behalf of the vendor, takes some action in regard to the property (such as the making of a planning application or a contract for the sale of the property) which, if disclosed to the vendor, might reasonably be supposed to be likely to influence him in deciding whether or not to conclude the contract, a fiduciary relationship arises between the two parties. That relationship imposes on the proposed purchaser a duty to disclose to the vendor before the conclusion of the contract what he has done as the vendor's purported agent, and in the event of non-disclosure there is a duty to account to the vendor for any profit made in the course of the purported agency, unless the vendor consents to his retaining it<sup>1</sup>.

1 *English v Dedham Vale Properties Ltd* [1978] 1 All ER 382 at 399, [1978] 1 WLR 93 at 111 per Slade J. On the facts, an account of profits was ordered where the proposed purchaser, in the name of but entirely without the knowledge of the vendor, obtained planning permission for the land he was proposing to buy, and failed to disclose that fact before contracts were exchanged.

## UPDATE

## **1-136 The Contract and Preliminary Matters**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (5) CAPACITY OF PARTIES/(i) Particular Persons/64. Aliens.

### **(5) CAPACITY OF PARTIES**

#### **(i) Particular Persons**

##### **64. Aliens.**

An alien may acquire and dispose of real property in the United Kingdom in the same manner in all respects as a British subject<sup>1</sup>.

<sup>1</sup> See the Status of Aliens Act 1914 s 17 (amended by the British Nationality Act 1948 s 34(3), Sch 4 Pt II). No right is thereby conferred on aliens to hold real property situate out of the United Kingdom: see the Status of Aliens Act 1914 s 17 proviso (1). See further BRITISH NATIONALITY, IMMIGRATION AND ASYLUM vol 4(2) (2002 Reissue) PARA 13. As to the effect of an outbreak of war on a contract pending completion see generally WAR AND ARMED CONFLICT.

### **UPDATE**

## **1-136 The Contract and Preliminary Matters**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (5) CAPACITY OF PARTIES/(i) Particular Persons/65. Bankrupts.

##### **65. Bankrupts.**

The estate of a bankrupt vests in the trustee in bankruptcy when the appointment of the trustee takes effect<sup>1</sup>, but this does not include property held by the bankrupt on trust for any other person<sup>2</sup>. In the case of registered land the trustee's title vests without any change in the proprietorship register<sup>3</sup>, although the trustee may apply to be registered as proprietor in place of the bankrupt<sup>4</sup>. The power to sell the property is exercisable by the trustee in bankruptcy and not by the bankrupt<sup>5</sup>. Any disposition of property made by the bankrupt after the date of the presentation of the bankruptcy petition and the date of the trustee's appointment is void unless the court consents to or ratifies the disposition<sup>6</sup>, except in favour of a purchaser who takes in good faith and without notice of the presentation of the petition<sup>7</sup>.

1 See the Insolvency Act 1986 s 306; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 390-391. As to the effect of the bankruptcy of the vendor or purchaser pending completion see PARA 206 et seq post.

2 See *ibid* s 283(3)(a); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 428 (trust property), 472 et seq (disclaimer by trustee).

3 See the Land Registration Act 1925 s 61(5); and LAND REGISTRATION.

4 See *ibid* s 42(1) (as amended); and LAND REGISTRATION vol 26 (2004 Reissue) PARA 922.

5 See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 390-391, 461.

6 See the Insolvency Act 1986 s 284; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 217. On a purchase by an undisclosed bankrupt where the purchase price is payable by instalments, non-disclosure of the bankruptcy is a ground for rescission by the vendor: *De Choisy v Hynes* [1937] 4 All ER 54.

7 See the Insolvency Act 1986 s 284(4); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 217. Both the bankruptcy petition and the bankruptcy order are registrable under the Land Charges Act 1972 (see ss 5(1)(b), 6(1)(c) (as substituted); and LAND CHARGES vol 26 (2004 Reissue) PARAS 647, 654), and the trustee's title is void against a purchaser of a legal estate in good faith for money or money's worth unless the bankruptcy order is registered (see s 6(5), (6); and LAND CHARGES vol 26 (2004 Reissue) PARA 658). Registration under the Land Charges Act 1972 does not give notice to a purchaser of registered land: see the Land Registration Act 1925 s 110(7); and LAND REGISTRATION.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

## 65 Bankrupts

NOTES 3, 4, 7--Land Registration Act 1925 repealed and replaced by the Land Registration Act 2002; see LAND REGISTRATION.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (5) CAPACITY OF PARTIES/(i) Particular Persons/66. Corporations.

## 66. Corporations.

The distinction between the powers of statutory corporations which can do only such acts as are authorised by the statutes creating them and non-statutory corporations which have in general the same rights as individuals<sup>1</sup>, the rights of corporations to own land and alienate property<sup>2</sup>, and the formalities of contracts with corporations<sup>3</sup> are dealt with elsewhere in this work.

1 See CORPORATIONS vol 9(2) (2006 Reissue) PARAS 1230-1231.

2 See CORPORATIONS vol 9(2) (2006 Reissue) PARA 1247 et seq. As to the acquisition of land by the British Railways Board and London Regional Transport see RAILWAYS, INLAND WATERWAYS AND CROSS-COUNTRY PIPELINES; LONDON GOVERNMENT. As to the sale of Crown land see CROWN PROPERTY vol 12(1) (Reissue) PARA 308.

3 See CORPORATIONS vol 9(2) (2006 Reissue) PARA 1272. As to contracts by limited companies see COMPANIES vol 14 (2009) PARAS 282-284. Contracts for the sale of land in the case of such companies are entered into by an officer of the company acting for and on behalf of the company and signed by the officer pursuant to a resolution of the board of directors.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (5) CAPACITY OF PARTIES/(i) Particular Persons/67. Company liquidators.

### 67. Company liquidators.

The liquidator of a company in any winding up has power, without the sanction of the court, to sell any of the company's property by public auction or by private contract<sup>1</sup>. The liquidator also has the power, without the sanction of the court or the liquidation committee, to do all acts and execute, in the name of the company, all deeds, receipts and other documents and for that purpose to use, when necessary, the company's seal<sup>2</sup>.

1 See the Insolvency Act 1986 ss 165, 167, Sch 4 Pt III para 6; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 577; COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 744.

2 See *ibid* ss 165, 167, Sch 4 Pt III para 7; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 577; COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 744. As to the effect of winding up upon a pending contract see PARA 212 et seq post; as to the form of a transfer by a company in liquidation see PARA 277 post. For an instance in which the dissolution of a company was declared void in order to enable a sale to be completed see *M'Call and Stephen Ltd Liquidator* 1920 37 Sc LR 480; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 937. As to the purchase of a company's property by a liquidator or member of the liquidation committee see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARAS 567; COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 643.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (5) CAPACITY OF PARTIES/(i) Particular Persons/68. Local authorities.

## **68. Local authorities.**

Local authorities may acquire land by agreement for the purpose of any of their functions under any public general Act and may be authorised to purchase land compulsorily<sup>1</sup>, and have wide general powers of disposal, subject, however, in many cases, to the necessary consent<sup>2</sup>.

1 See generally LOCAL GOVERNMENT vol 69 (2009) PARA 1 et seq; LONDON GOVERNMENT. As to acquisitions by local education authorities see EDUCATION vol 15(2) (2006 Reissue) PARA 1356 et seq.

2 See generally LOCAL GOVERNMENT vol 69 (2009) PARA 1 et seq. As to sales by local education authorities see EDUCATION vol 15(2) (2006 Reissue) PARA 1361; and as to the position of persons deriving title under transactions requiring ministerial consent see PARA 25 ante.

### **UPDATE**

#### **1-136 The Contract and Preliminary Matters**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (5) CAPACITY OF PARTIES/(i) Particular Persons/69. Ecclesiastical corporations.

## **69. Ecclesiastical corporations.**

The Church Commissioners have power to acquire land for the purpose of providing churches and houses of residence<sup>1</sup>. Diocesan boards of finance have statutory powers to sell or otherwise dispose of diocesan glebe land on terms approved by the Church Commissioners<sup>2</sup>.

1 See generally ECCLESIASTICAL LAW.

2 See the Endowments and Glebe Measure 1976 s 20(1); and ECCLESIASTICAL LAW. As to the power of ecclesiastical corporations to sell land for the purpose of enlarging cemeteries see generally CREMATION AND BURIAL. As to their power to transfer land to literary and scientific institutions see CHARITIES vol 8 (2010) PARA 69; NATIONAL CULTURAL HERITAGE vol 77 (2010) PARA 948.

### **UPDATE**

#### **1-136 The Contract and Preliminary Matters**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.



Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (5) CAPACITY OF PARTIES/(i) Particular Persons/70. Unincorporated bodies.

## **70. Unincorporated bodies.**

Unincorporated bodies of persons cannot, as such, acquire land; they can only do so as individuals in their private capacity. Thus, the inhabitants of a place, or parishioners, or the commoners of a waste cannot *eo nomine* purchase land<sup>1</sup>.

1 Co Litt 3a.

### **UPDATE**

#### **1-136 The Contract and Preliminary Matters**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (5) CAPACITY OF PARTIES/(i) Particular Persons/71. Minors.

## **71. Minors.**

A minor cannot absolutely bind himself by a contract for the sale or purchase of land<sup>1</sup>. A minor is allowed to ratify an otherwise unenforceable contract on attaining majority<sup>2</sup>. As regards the acquisition or disposal under the contract of an interest in land, the contract, unless it is clearly prejudicial to his interests, is not void but is voidable by the minor on his coming of age or within a reasonable time thereafter, or by his representatives if he dies under age or after attaining full age without having adopted the contract<sup>3</sup>. A minor cannot hold a legal estate in land<sup>4</sup>, and where he is entitled to any beneficial interest the legal estate must be vested in persons acting on his behalf on a trust of land<sup>5</sup>.

1 See CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 12 et seq (voidability of minor's contracts at common law), 23 (effect of misrepresentation as to age).

2 See the Minors' Contracts Act 1987 ss 1(a), 4(2). See, however, *Davies v Beynon-Harris* (1931) 47 TLR 424. See further CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 14.

3 See CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARAS 25, 37.

4 Law of Property Act 1925 s 1(6).

5 See CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 30 et seq. It has been the practice to vest land in trustees for sale to hold the proceeds in trust for the minor, thereby avoiding the provisions of the Settled Land Act 1925. As from 1 January 1997 it is no longer possible to create a strict settlement under the Settled Land Act 1925: see the Trusts of Land and Appointment of Trustees Act 1996 s 2; and SETTLEMENTS vol 42 (Reissue) PARA 676. By amendments made by the Trusts of Land and Appointment of Trustees Act 1996, all trusts for sale formerly imposed by statute have become trusts of land (without a duty to sell) and land formerly held on such implied trusts for sale is now held in trust for the persons interested in the land: see s 5, Sch 2

paras 1-6 (amending the Law of Property Act 1925 ss 31, 32, 34, 36; the Administration of Estates Act 1925 s 33; and the Reverter of Sites Act 1987 s 1); and REAL PROPERTY vol 39(2) (Reissue) PARA 66. See also the Trusts of Land and Appointment of Trustees Act 1996 Sch 2 para 7; and REAL PROPERTY vol 39(2) (Reissue) PARA 56. Where after 1 January 1997 a person purports to transfer a legal estate in land to a minor, the land is held in trust for the minor: see s 2, Sch 1 paras 1, 2. As to the exercise of powers by a minor see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 52.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (5) CAPACITY OF PARTIES/(i) Particular Persons/72. Persons suffering from mental disorder.

#### 72. Persons suffering from mental disorder.

A contract for the sale or purchase of land entered into by a person suffering from a mental disorder sufficient to deprive him of contractual capacity is voidable if the other party knew of the disorder, and in such a case the transaction can be set aside by the person himself if he recovers, or by his representatives. If the other party had no knowledge of the disorder or of facts from which such knowledge should be inferred, the contract is valid, and if it is fair it will be enforced against the person suffering from the disorder<sup>1</sup>.

The judge<sup>2</sup>, with respect to the property and affairs of patients suffering from mental disorder, has power<sup>3</sup> to make orders and give directions and authorities<sup>4</sup> for the sale, exchange, charging of or other disposition of or dealing with a patient's property<sup>5</sup>, the carrying out of a contract entered into by the patient<sup>6</sup> or the exercise of any power vested in the patient<sup>7</sup> and to appoint a receiver for the patient who must carry out any such orders or directions<sup>8</sup>.

1 *Molton v Camroux* (1848) 2 Exch 487 at 501 (affd (1849) 4 Exch 17); *Elliot v Ince* (1857) 7 De GM & G 475 at 488; *Imperial Loan Co v Stone* [1892] 1 QB 599 at 601, CA; *Baldwyn v Smith* [1900] 1 Ch 588 at 590; *York Glass Co Ltd v Jubb* (1925) 42 TLR 1, CA; *Broughton v Snook* [1938] Ch 505, [1938] 1 All ER 411. As to the contracts of persons suffering from mental disorder generally see MENTAL HEALTH vol 30(2) (Reissue) PARA 600 et seq. As to mental disorder supervening before completion see PARA 218 post.

2 The functions expressed to be conferred by the Mental Health Act 1983 Pt VII (ss 93-113) (as amended) on 'the judge' are exercisable by the Lord Chancellor or by any nominated judge or, subject to certain qualifications, by the master of the Court of Protection, by the Public Trustee, or by any nominated officer: see s 94(1) (amended by the Public Trustee and Administration of Funds Act 1986 s 2); and MENTAL HEALTH vol 30(2) (Reissue) PARA 674.

3 See the Mental Health Act 1983 s 95; and MENTAL HEALTH vol 30(2) (Reissue) PARA 682.

4 See *ibid* s 96(1); and MENTAL HEALTH vol 30(2) (Reissue) PARA 683.

5 See *ibid* s 96(1)(b); and MENTAL HEALTH vol 30(2) (Reissue) PARA 683.

6 See *ibid* s 96(1)(h); and MENTAL HEALTH vol 30(2) (Reissue) PARA 683.

7 See *ibid* s 96(1)(k); and MENTAL HEALTH vol 30(2) (Reissue) PARA 683.

8 See *ibid* s 99; and MENTAL HEALTH vol 30(2) (Reissue) PARA 704. The judge also has power to make orders and give directions and authorities for the execution for the patient of a will: see s 96(1)(e); and MENTAL HEALTH vol 30(2) (Reissue) PARA 683.

## **UPDATE**

### **1-136 The Contract and Preliminary Matters**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (5) CAPACITY OF PARTIES/(i) Particular Persons/73. Persons purchasing under compulsory powers.

#### **73. Persons purchasing under compulsory powers.**

Where an authority is authorised to acquire land compulsorily, the procedure is governed by statute<sup>1</sup>, and persons under disability are given special powers of selling and transferring the land to the acquiring authority<sup>2</sup>. The effect of the service of notice to treat is to establish a relation analogous in some respects to that of purchaser and vendor, but the actual relation of vendor and purchaser is not established until the price has been ascertained<sup>3</sup>. The transaction must normally be completed by the execution of a transfer<sup>4</sup>.

1 See COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARAS 556 et seq (compulsory purchase orders), 550 et seq (purchase by agreement), and 615 et seq (conditions precedent to exercise of compulsory powers).

2 See COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 553 (persons entitled to sell), and PARA 555 (payment of purchase money into court).

3 See COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 631.

4 See COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 658. As to the costs of the transfer see PARA 325 post; and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 659; as to the execution of a deed poll on the owner's default or absence see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 661 et seq; and as to the expedited procedure by way of vesting declaration see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 686 et seq. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

## **UPDATE**

### **1-136 The Contract and Preliminary Matters**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (5) CAPACITY OF PARTIES/ (ii) Fiduciary and other Vendors/74. Beneficial joint tenants.

## (ii) Fiduciary and other Vendors

### 74. Beneficial joint tenants.

A legal estate in land beneficially limited to or held on trust for joint tenants<sup>1</sup> is held on a trust of land<sup>2</sup>. Where a transfer is made to two persons without any further words, a purchaser can assume that they are beneficial joint tenants or, at any rate, it is safe for him to deal with the title on that assumption<sup>3</sup>. For the purpose of exercising their functions as trustees, the trustees of land have in relation to the land subject to the trust all the powers of an absolute owner<sup>4</sup>.

Where a transfer is made by the survivor of two or more joint tenants he is deemed, in favour of a purchaser of the legal estate, to be solely and beneficially interested if the transfer includes a statement that he is so interested<sup>5</sup>. However, the purchaser is not protected if at any time before the date of the disposition by the survivor a memorandum of severance<sup>6</sup> had been indorsed on or annexed to the conveyance by virtue of which the legal estate vested in the joint tenants<sup>7</sup>, or if a bankruptcy order, or a petition for such an order, made against any of the joint tenants, had been registered under the Land Charges Act 1972, being an order or petition of which the purchaser had notice, by virtue of the registration, on the date of the transfer by the survivor<sup>8</sup>.

1 As to a joint tenancy see REAL PROPERTY vol 39(2) (Reissue) PARA 190 et seq.

2 See the Law of Property Act 1925 s 36(1) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 5(1), Sch 2 para 4).

3 *Re Soden and Alexander's Contract* [1918] 2 Ch 258. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

4 Trusts of Land and Appointment of Trustees Act 1996 s 6(1). However, such powers may be excluded or restricted, and may be made subject to the obtaining of any consent: see s 8; and TRUSTS vol 48 (2007 Reissue) PARAS 1035, 1046. As to the protection of purchasers where trustees of land transfer land in contravention of their powers and duties see s 16 (s 16 does not apply to registered land: s 16(7)); and TRUSTS vol 48 (2007 Reissue) PARAS 1035-1036. As to the consequences of this limitation see Ferris and Battersby 'The Impact of the Trusts of Land and Appointment of Trustees Act 1996 on Purchasers of Registered Land' [1998] Conv 168.

5 See the Law of Property (Joint Tenants) Act 1964 s 1(1) (amended by the Law of Property (Miscellaneous Provisions) Act 1994 s 21, Sch 1 para 3, Sch 2), which also applies, with the necessary modifications, to a transfer by the personal representatives of the survivor of joint tenants: see the Law of Property (Joint Tenants) Act 1964 s 1(2). Where the transfer was made on or before 1 July 1995, the deeming provision applies where the vendor transferred as beneficial owner: see s 1(1) (as originally enacted). Section 1 (as originally enacted) is deemed to have come into operation on 1 January 1926, and for the purposes of s 1 (as originally enacted) in its application to a conveyance executed before 31 July 1964 a statement signed by the vendor or by his personal representatives that he was solely and beneficially interested is to be treated as if it had been included in the conveyance: s 2. The Act does not apply to registered land: s 3 (there is a possibility that, severance having taken place, the former joint tenant might be in actual occupation and thus have an overriding interest binding on the purchaser: cf *Williams and Glyn's Bank Ltd v Boland* [1981] AC 487, [1980] 2 All ER 408, HL).

6 I.e. a note or memorandum signed by the joint tenants or one of them recording that the joint tenancy was severed in equity on a date specified in it: Law of Property (Joint Tenants) Act 1964 s 1(1) proviso (a).

7 *Ibid* s 1(1) proviso (a). As to severance generally see REAL PROPERTY vol 39(2) (Reissue) PARAS 198-206.

8 Law of Property (Joint Tenants) Act 1964 s 1(1) proviso (b) (amended by the Insolvency Act 1985 s 235(1), Sch 8 para 13); Land Charges Act 1972 s 18(6). As to the registration of a bankruptcy order, or a petition for such an order see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 193; LAND CHARGES vol 26 (2004 Reissue) PARAS 647, 654. As to registration as notice see LAND CHARGES vol 26 (2004 Reissue) PARA 616.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (5) CAPACITY OF PARTIES/ (ii) Fiduciary and other Vendors/75. Fiduciary vendors, limited owners and mortgagees.

## **75. Fiduciary vendors, limited owners and mortgagees.**

Sales of land by persons acting in a fiduciary capacity, such as trustees under private trusts<sup>1</sup>, trustees of charity land<sup>2</sup>, and the personal representatives of a deceased person<sup>3</sup>, sales by limited owners under the Settled Land Act 1925<sup>4</sup>, and sales by mortgagees under express or statutory powers<sup>5</sup> are dealt with elsewhere in this work<sup>6</sup>.

1 As to the use of depreciatory conditions see EXECUTORS AND ADMINISTRATORS; SETTLEMENTS vol 42 (Reissue) PARA 906; TRUSTS vol 48 (2007 Reissue) PARA 1044. In *Micholls v Corbett* (1865) 3 De GJ & Sm 18, a purchaser who had been required by conditions to take the risk of a breach of trust and make no objections to it was precluded from objecting to the title on the ground of concurrence in such breach. As to the powers and duties of trustees purchasing land for the purposes of the trust, and as to the disability of a trustee to purchase the trust property himself see EQUITY vol 16(2) (Reissue) PARA 857; TRUSTS vol 48 (2007 Reissue) PARA 938. As to purchases by solicitors see LEGAL PROFESSIONS vol 66 (2009) PARAS 804-807.

2 See CHARITIES vol 8 (2010) PARA 395 et seq. As to the effect of failure to obtain a necessary consent to a contract for the sale of charity land see PARA 25 ante.

3 See generally EXECUTORS AND ADMINISTRATORS. Trustees and personal representatives have also a statutory power of sale for the purpose of raising inheritance tax, whether the property is or is not vested in them: see generally EXECUTORS AND ADMINISTRATORS; INHERITANCE TAXATION vol 24 (Reissue) PARA 652. As to the power of personal representatives to complete a contract, in the event of the death of a vendor or purchaser pending completion see PARAS 202-205 post; and EXECUTORS AND ADMINISTRATORS.

4 See SETTLEMENTS vol 42 (Reissue) PARA 827 et seq.

5 See MORTGAGE vol 77 (2010) PARA 440 et seq. As to the aiding of sales under express powers where the terms of the power are imperfectly complied with see generally POWERS. Express powers (other than powers vested in legal mortgagees or estate owners in right of their estates) operate only in equity: see the Law of Property Act 1925 s 1(7); and POWERS.

6 See also MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 285 et seq.

## **UPDATE**

### **1-136 The Contract and Preliminary Matters**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/(i) In general/76. Conditions in general.

## **(6) CONDITIONS OF SALE AND SPECIAL CONDITIONS**

### **(i) In general**

#### **76. Conditions in general.**

An agreement for the sale of land which merely satisfies the formal requirements of a written contract<sup>1</sup>, leaving all other terms to be implied by law, is called an 'open contract'<sup>2</sup>. The vendor usually desires to exclude or modify the terms which would be implied by law, and provisions for this purpose are inserted in a formal contract or in conditions of sale<sup>3</sup>. Printed forms of such conditions are in general use<sup>4</sup>, and for contracts by correspondence<sup>5</sup> there is a statutory form, which may also be applied to other contracts<sup>6</sup>.

1 As to the matters which must be contained in a contract for the sale of land see PARAS 29-40 ante.

2 See PARA 137 note 1 post. As to the statutory provisions which apply to such a contract see the Law of Property Act 1925 ss 42-45 (as amended), 47; the Law of Property Act 1969 s 23; and PARAS 139-140, 142, 150, 171-173 post.

3 See *Hyde v Dallaway* (1842) 4 Beav 606; *Re Priestley's Contract* [1947] Ch 469, [1947] 1 All ER 716 (deletion of one or a part of one of printed conditions having unnoticed effect upon another condition). As to a condition designed to exclude or restrict liability for a misrepresentation see PARA 111 post; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 803, 828.

4 The Standard Conditions of Sale (3rd Edn) are in general use and form the basis of the great majority of residential and commercial conveyancing transactions. As to the Standard Conditions of Sale see PARA 1 note 9 ante. Where a lessee is acquiring the freehold under the Leasehold Reform Act 1967, the statutory conditions of sale prescribed by that Act will apply in the absence of agreement to the contrary: see s 22(2) (as amended); the Leasehold Reform (Enfranchisement and Extension) Regulations 1967, SI 1967/1879; and LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1440.

5 As to such contracts see PARA 23 ante. Oral acceptance of an offer by letter, or acceptance by letter of an offer made orally, does not constitute a contract by correspondence; there must be an exchange of letters: *Stearn v Twitchell* [1985] 1 All ER 631, [1985] NLJ Rep 128. However, in view of the statutory requirement that the contract should be in a written document signed by both parties (see PARA 29 et seq ante), it seems doubtful whether a contract by correspondence could now arise.

6 See the Statutory Form of Conditions of Sale 1925, SR & O 1925, 1925/779. These conditions apply, subject to any modification, or any intention to the contrary expressed in the correspondence, and they may by express reference be made to apply to any other contract for the sale of land: see the Law of Property Act 1925 s 46. These statutory conditions are very short and it should be considered whether it is necessary to add to them or to substitute one of the usual sets of printed conditions. There are also various statutory conditions contained in the Law of Property Act 1969 s 23. Where, after an abortive auction, the property is sold by private treaty, the conditions of sale which were to have applied at the auction will not be incorporated unless referred to in the contract: *Cowley v Watts* (1853) 17 Jur 172; cf *Dewar v Mintoft* [1912] 2 KB 373.

### **UPDATE**

#### **1-136 The Contract and Preliminary Matters**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/(i) In general/77. General and special conditions.

## 77. General and special conditions.

The modern printed conditions are general conditions, which are intended to be applicable to all transactions. Where, in a particular transaction, it is necessary to vary or supplement the general conditions, that matter should be made a special condition. For example, if the purchaser is to enter into a restrictive covenant with the vendor, that intention, with the wording of the intended covenant, should be stated in a special condition<sup>1</sup>. In the event of inconsistency between the general and the special conditions, the special conditions will prevail<sup>2</sup>. The principles of construction stated subsequently are applicable to all conditions, but their application is principally of importance in the case of conditions restricting the title to be shown, which may be misleading conditions<sup>3</sup>.

1 See PARA 81 post.

2 See the Standard Conditions of Sale (3rd Edn), Special Condition 1(a). As to the Standard Conditions of Sale see PARA 1 note 9 ante.

3 See PARA 83 post.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/(i) In general/78. Construction of conditions.

## 78. Construction of conditions.

Conditions must be expressed in clear and unambiguous language<sup>1</sup>. In accordance with the general rule of construction, in the case of ambiguity a condition will be construed most strongly against the grantor, namely the vendor who is the framer of the condition<sup>2</sup>. In considering the effect of a condition it may be material that the purchaser is a lawyer<sup>3</sup>.

1 *Symons v James* (1842) 1 Y & C Ch Cas 487 at 490; *Taylor v Martindale* (1842) 1 Y & C Ch Cas 658; *Williams v Wood* (1868) 16 WR 1005.

2 *Greaves v Wilson* (1858) 25 Beav 290; *Re Terry and White's Contract* (1886) 32 ChD 14 at 28 per Lindley LJ; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 165, 178. The proposition is sometimes stated in the case of conditions of sale as construction in favour of the party whose rights are restricted, ie the purchaser: *Osborne v Harvey* (1842) 12 LJ Ch 66; *Seaton v Mapp* (1846) 2 Coll 556 at 562; *Rhodes v Ibbetson*

(1853) 4 De GM & G 787; *Drysdale v Mace* (1854) 5 De GM & G 103; *Cruse v Nowell* (1856) 25 LJ Ch 709; *Brumfit v Morton* (1857) 30 LTOS 98; *Allmann v McDaniel* [1912] 1 IR 467. See also Harpum 'Exclusion Clauses and Contracts for the Sale of Land' [1992] CLJ 263, 284-294. It is arguable that the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159 (see CONTRACT vol 9(1) (Reissue) PARAS 790-796), apply to contracts for the sale of land (unlike the Unfair Contract Terms Act 1977): see Bright and Bright 'Unfair Terms in Land Contracts: Copy Out or Cop Out?' (1995) 111 LQR 655. See also PARA 166 post.

3 *Minet v Leman* (1855) 7 De GM & G 340 at 352. As to the contra proferentem rule see CONTRACT vol 9(1) (Reissue) PARA 776.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### 78 Construction of conditions

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 2--SI 1994/3159 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083. See *Bride Hall Estates Ltd v George North London Ltd* [2004] EWCA Civ 141, [2004] 09 EG 144 (CS) (unclear contractual term on aggregate sale price of residential units; residential unit included car parking space).

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/(i) In general/79. Particulars.

### 79. Particulars.

Attached to the conditions of sale are particulars which describe the property to be sold, whereas the conditions of sale state the terms on which it is to be sold<sup>1</sup>. The particulars must be accurate<sup>2</sup>. The property may be described in any way sufficient to identify it<sup>3</sup>. Any covenants, rights to minerals or other rights which it is intended to except or reserve on the sale, and any easements or rights which it is intended to confer expressly on the purchaser, must be mentioned, as must any subsisting incumbrances, easements, restrictive covenants or other matters affecting the value of the property subject to which the property is to be sold<sup>4</sup>. The tenure of the property should be stated; for example if it is leasehold and is held by an underlease, that fact should be specified<sup>5</sup>.

An oral correction of the particulars made by an auctioneer at a sale cannot be admitted to vary the written contract, but it usually prevents the purchaser from obtaining specific performance without the correction<sup>6</sup>.

1 *Torrance v Bolton* (1872) LR 14 Eq 124 at 130; affd 8 Ch App 118. See also PARA 114 note 2 post.

2 See eg *Calverley v Williams*, *Williams v Calverley* (1790) 1 Ves 210; and BOUNDARIES vol 4(1) (2002 Reissue) PARA 907. The parcels in the transfer must normally correspond with the particulars in the contract: see



generally DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 230. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

3 See BOUNDARIES vol 4(1) (2002 Reissue) PARA 904. As to the rule that a sale of land prima facie includes fixtures and growing timber see PARA 88 post; and as to conditions as to identity see PARAS 109-116 post.

4 See eg *Burnell v Brown* (1820) 1 Jac & W 168; *Nottingham Patent Brick and Tile Co v Butler* (1886) 16 QBD 778, CA; *Torrance v Bolton* (1872) 8 Ch App 118; and PARA 81 post. As to the position of a purchaser who is deemed by statute to have had actual notice of a local land charge see PARA 54 ante.

5 *Re Russ and Brown's Contract* [1934] Ch 34, CA. Cf *Re Thompson and Cottrell's Contract* [1943] Ch 97, [1943] 1 All ER 169 (cited in PARA 59 note 1 ante). It seems, however, to be unnecessary to distinguish between an underlease and a sub-underlease: *Becker v Partridge* [1966] 2 QB 155 at 170, [1966] 2 All ER 266 at 270, CA.

6 *Manser v Back* (1848) 6 Hare 443; *Re Hare and O'More's Contract* [1901] 1 Ch 93. See also 1 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 104; and AUCTION vol 2(3) (Reissue) PARA 243.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/(i) In general/80. Compulsory purchase and planning restrictions.

### 80. Compulsory purchase and planning restrictions.

The position as to possible compulsory purchase of the property will have been examined when the preliminary inquiries before contract were made<sup>1</sup>, but in some circumstances the position may be left in some doubt and then the conditions may include a provision giving the purchaser an option, to be exercised on notice, to rescind the contract with repayment of the deposit without interest or to complete the contract<sup>2</sup>. If a compulsory purchase order is made pending completion where there is no such condition, the purchaser must complete, but he is entitled to the compensation money<sup>3</sup>.

Questions relating to the position under planning legislation should be dealt with when the preliminary inquiries are made<sup>4</sup>. A condition now often inserted provides for rescission if the permitted use of the property is not that which has been stated in the particulars or the contract<sup>5</sup>. Where a contract is conditional upon the obtaining of planning permission, it is a question of construction of the particular contract whether the condition is fulfilled by the obtaining of outline planning permission<sup>6</sup>. Where a planning application is made by the vendor before contract, he is under an implied obligation not to withdraw the application after contract without the purchaser's consent<sup>7</sup>.

1 See PARA 15 ante.

2 Unlike previous sets of general conditions, the Standard Conditions of Sale (3rd Edn), do not contain such a provision. As to the Standard Conditions of Sale see PARA 1 note 9 ante.

3 *Hillingdon Estates Co v Stonefield Estates Ltd* [1952] Ch 627, [1952] 1 All ER 853, where a contract was held not to have been frustrated by a compulsory purchase order or the service of a notice to treat. As to the effect of a notice to treat generally see PARA 73 ante; and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 631 et seq. See also *Amalgamated Investment and Property Co Ltd v John Walker & Sons Ltd* [1976] 3 All ER 509, [1977] 1 WLR 164, CA (building listed two days after contract for sale); *E Johnson & Co (Barbados) Ltd v NSR Ltd* [1997] AC 400, [1996] 3 WLR 583, PC (contract not frustrated by notice of intention to acquire the land compulsorily).

4 See PARA 11 et seq ante.

5 See The Law Society's General Conditions of Sale (1980 Edn), condition 4(3)(b); and the National Conditions of Sale (20th Edn), condition 17; and cf the Conveyancing Lawyers' Conditions of Sale, condition 5.

6 *Hargreaves Transport Ltd v Lynch* [1969] 1 All ER 455, [1969] 1 WLR 215, CA; *Richard West & Partners (Inverness) Ltd v Dick* [1969] 2 Ch 424, [1969] 1 All ER 943, CA. See also PARA 26 ante.

7 *Sinclair-Hill v Sothcott* (1973) 26 P & CR 490.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/(i) In general/81. Covenants and other provisions.

#### 81. Covenants and other provisions.

References to covenants and other provisions to be inserted in the transfer will appear both in the particulars and the conditions<sup>1</sup>. It is important that these should as far as possible be in the precise terms in which they are to be inserted in the transfer<sup>2</sup>. Where the vendor is under a continuing liability under a subsisting covenant, he will be entitled to an indemnity<sup>3</sup>. Where it is intended to impose restrictive covenants, their precise form should appear in the contract which should be drafted with a view to the covenants running with the land<sup>4</sup>. A condition giving an option or a right of pre-emption to the vendor, if required, must be drafted with particular care, stating all the terms under which the repurchase is to be exercisable and, where necessary, must be limited within the time allowed by the rule against perpetuities<sup>5</sup>. Further, since such a right, so far as it creates a proprietary interest, is registrable as an estate contract<sup>6</sup>, provision should be made for the vacation of the charge if that becomes necessary<sup>7</sup>. The conditions should also define the title to be required on repurchase and should contain definite provisions as to notices and the service of notices. Where the vendor retains adjoining land, it might be stipulated that the transfer is to contain a covenant that all lights and windows are opened with the express consent of the vendor and no length of enjoyment by the purchaser or his successors in title is to give an indefeasible right to light or air or to any right to impede or control the erection of buildings on the retained land<sup>8</sup> and that the purchaser is to take no action in respect of any registration of a light obstruction notice<sup>9</sup> by the vendor. Since, as a general rule and apart from express provision to the contrary, conditions merge in the transfer<sup>10</sup>, these terms must also appear in the transfer.

It seems desirable to provide<sup>11</sup> that if the purchaser registers the contract as an estate contract<sup>12</sup> and it is rescinded by the vendor, the purchaser must at his own expense procure the vacation of the register<sup>13</sup>.

1 As to the particulars see PARA 79 ante. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

2 As to descriptions see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 226 et seq.

3 See the Standard Conditions of Sale (3rd Edn), conditions 3.3.2(d), 4.5.4; and PARA 57 ante. As to the Standard Conditions of Sale see PARA 1 note 9 ante.

4 As to covenants running with the land see PARA 331-335 post; and EQUITY vol 16(2) (Reissue) PARA 613 et seq.

5 See eg *London and South Western Rly Co v Gomm* (1882) 20 ChD 562, CA; para 27 ante; and PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1038.

6 See the Land Charges Act 1972 s 2(4) (as amended), Class C(iv): see LAND CHARGES vol 26 (2004 Reissue) PARAS 628, 632.

7 See note 13 infra.

8 See the Standard Conditions of Sale (3rd Edn) which provide that the purchaser will have no right of light or air over the retained land, but otherwise the vendor and the purchaser will each have the rights over the land of the other which they would have had if they were two separate purchasers to whom the vendor had made simultaneous transfers of the property and the retained land: condition 3.4.2. See also *Squarey v Harris-Smith* (1981) 42 P & CR 118, CA; and cf *Lyme Valley Squash Club Ltd v Newcastle-under-Lyme Borough Council* [1985] 2 All ER 405 (this latter decision, that the purchaser acquired an easement of light despite a condition to the contrary seems very questionable).

9 See the Rights of Light Act 1959 ss 2 (as amended), 3; and EASEMENTS AND PROFITS A PRENDRE.

10 See PARA 293 post; and DEEDS AND OTHER INSTRUMENTS.

11 If either party rescinds the contract the buyer is to return any documents he received from the seller and is to cancel any registration of the contract: Standard Conditions of Sale (3rd Edn), condition 7.2(b). For the meaning of 'contract' see PARA 55 note 10 ante. Where the rescission is by the vendor on the ground of his inability or unwillingness to satisfy a requisition (see PARA 104 post), it seems desirable that the vendor should indemnify the purchaser against the expense of procuring the vacation of the register.

12 See note 6 supra.

13 The provisions as to vacation are such that without the aid of such a condition the vacation might need an application to the court or even proceedings to enforce or rescind the contract: see eg *Re Engall's Agreement* [1953] 2 All ER 503, [1953] 1 WLR 977; *Heywood v BDC Properties Ltd* [1963] 2 All ER 1063, [1963] 1 WLR 975, CA; *Hooker v Wyle* [1973] 3 All ER 707, [1974] 1 WLR 235; and LAND CHARGES vol 26 (2004 Reissue) PARAS 619, 645.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/(i) In general/82. Sale of life interests and remainders.

## **82. Sale of life interests and remainders.**

In general, sales of life interests and remainders are made to relatives of the vendor who are in possession of the relevant facts affecting the value of the interest to be sold, or to insurance companies which have their own forms of conditions and inquiries. In other cases it is necessary in the first place to require evidence of the age of the tenant for life. A purchaser must be satisfied that this is accurately stated. Usually a birth certificate is available. In its absence a statutory declaration by a member of the family is generally accepted. Where the remainderman's pedigree is material to the title the vendor normally offers such certificates of birth, death and marriage as are in the vendor's possession or can be obtained at the purchaser's expense<sup>1</sup>. The purchaser must obtain sufficient evidence to enforce his rights after completion against the trustees. Where the death of the testator under whose will the interest sold arises is recent, there is usually a condition that it is to be assumed that all debts, legacies, taxes and liabilities have been duly discharged. A further usual condition is that a statement by the trustees that they have not received notice of any incumbrance is to be accepted as conclusive evidence. Provision must be made for the incidence of future inheritance tax<sup>2</sup>.

<sup>1</sup> As to such certificates as evidence see CIVIL PROCEDURE vol 11 (2009) PARA 1094. As to registration concerning the individual see REGISTRATION CONCERNING THE INDIVIDUAL.

<sup>2</sup> As to the inheritance tax implications of sales of life interests and remainders see INHERITANCE TAXATION vol 24 (Reissue) PARA 486 et seq.

## **UPDATE**

### **1-136 The Contract and Preliminary Matters**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/(i) In general/83. Misleading conditions.

## **83. Misleading conditions.**

Conditions restricting the title or proof of title to which the purchaser is entitled must neither state nor suggest things which to the vendor's knowledge are incorrect. A condition is misleading, and therefore not binding, if it requires the purchaser to assume that which the vendor knows to be false, or if it affirms that the state of the title is not accurately known to the vendor when in fact it is known<sup>1</sup>. Similarly, a condition will not be binding if it stipulates for the commencement of the title within the period of 15 years<sup>2</sup> with a certain transfer simpliciter, without disclosing, as is the fact, that the transfer is a voluntary one<sup>3</sup>, or if it is used by a

vendor who knows that he has a bad title in order to palm that title off upon the purchaser<sup>4</sup>. However, a slight inaccuracy which has not misled the purchaser is immaterial<sup>5</sup>.

1 *Edwards v Wickwar* (1865) LR 1 Eq 68; *Re Banister, Broad v Munton* (1879) 12 ChD 131 at 143, CA. See also *Harnett v Baker* (1875) LR 20 Eq 50; *Boyd v Dickson* (1876) IR 10 Eq 239; *Heywood v Mallalieu* (1883) 25 ChD 357; *Re Haedicke and Lipski's Contract* [1901] 2 Ch 666; *Becker v Partridge* [1966] 2 QB 155, [1966] 2 All ER 266, CA; *Faruqi v English Real Estates Ltd* [1979] 1 WLR 963; *Walker v Boyle* [1982] 1 All ER 634, [1982] 1 WLR 495; *Sakkas v Donford Ltd* (1982) 46 P & CR 290; *Rignall Developments Ltd v Halil* [1988] Ch 190, [1987] 3 All ER 170. The vendor must tell the truth and all the truth which is relevant to the matter in hand: *Martin v Cotter* (1846) 3 Jo & Lat 496; *Nottingham Patent Brick and Tile Co v Butler* (1886) 16 QBD 778, CA. It is the vendor's duty to make himself acquainted with all the peculiarities and incidents of the property: *Brandling v Plummer* (1854) 2 Drew 427 at 430. If, however, the vendor believes the truth of the facts which the purchaser is required to assume, the condition is not misleading, even if it precludes the purchaser from requiring evidence which is essential to the title; and it is not necessary to state in the condition the specific defect which the condition is intended to cover: *Re Sandbach and Edmondson's Contract* [1891] 1 Ch 99, CA. Cf *Nash v Browne* (1863) 9 Jur NS 431 (which seems questionable); and see *Blenkhorn v Penrose* (1880) 29 WR 237; *Blaiberg v Keeves* [1906] 2 Ch 175. See also *Beyfus v Lodge* [1925] Ch 350. A condition which refers to a particular document and offers an opportunity of inspecting it is not misleading unless it refers to the document in such a way as to lead to the belief that all which is material for the purchaser to know is disclosed in the condition and nothing further is (contrary to the fact) to be learnt on inspection: *Blenkhorn v Penrose* supra. In the case of such a condition, so long as the vendor has stated what he believes to be true, the condition is binding, even if the purchaser proves that the title is wholly bad; but the court will not grant the vendor specific performance and will leave him to his remedy at law in damages: *Re Scott and Alvarez's Contract, Scott v Alvarez* [1895] 2 Ch 603, CA.

2 See PARA 139 post. If a title for the full 15 years is shown, commencing with a conveyance inter vivos, it is not necessary that this be for value: see PARA 142 post; and 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 236.

3 *Re Marsh and Earl Granville* (1882) 24 ChD 11, CA; and see PARA 142 post. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

4 *Re Scott and Alvarez's Contract, Scott v Alvarez* [1895] 1 Ch 596 at 605, CA. A fortiori, in the case of a sale by the court, the utmost good faith must be shown: *Else v Else* (1872) LR 13 Eq 196 at 201; *Manifold v Johnston* [1902] 1 IR 7. See also PARA 133 note 6 post. As to a condition limiting the time for requisitions or objections see PARAS 102-103 post.

5 *Re Ossemsley Estates Ltd* [1937] 1 All ER 782, not considered on appeal [1937] 3 All ER 774, CA.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/A. BIDDING AT AUCTION/84. Bidding.

## (ii) Rights under Particular Conditions

### A. BIDDING AT AUCTION

#### 84. Bidding.

On a sale by auction the conditions usually state that the sale of the property and of each lot is subject to a reserve price<sup>1</sup>, and that the vendor or his agent may bid up to that reserve<sup>2</sup>. It is provided that the auctioneer may refuse any bid<sup>3</sup> and that, the auctioneer may determine any dispute as to a bid<sup>4</sup> or restart the auction at the last undisputed bid<sup>5</sup>.

A contract made at a public auction is not subject to the statutory requirement as to writing<sup>6</sup>.

1 See the Standard Conditions of Sale (3rd Edn), conditions 2.3.1, 2.3.2. As to the Standard Conditions of Sale see PARA 1 note 9 ante. As to a sale by auction see generally AUCTION.

2 See the Standard Conditions of Sale (3rd Edn), condition 2.3.3.

3 See the Standard Conditions of Sale (3rd Edn), condition 2.3.4.

4 See the Standard Conditions of Sale (3rd Edn), condition 2.3.5. This power may be exercised where the dispute concerns whether a bid had been communicated to the auctioneer: *Richards v Phillips* [1969] 1 Ch 39, [1968] 2 All ER 859, CA.

5 See the Standard Conditions of Sale (3rd Edn), condition 2.3.5. Under the general law a bidder may retract a bid at any time until its acceptance (see *Payne v Cave* (1789) 3 Term Rep 148; *Jones v Nannev* (1824) 13 Price 76 at 103; Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 14), but under special circumstances a bidder may be unable to retract (see *Freer v Rimner* (1844) 14 Sim 391).

6 See the Law of Property (Miscellaneous Provisions) Act 1989 s 2(5)(b); and PARA 29 ante.

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#### 85. Sale subject to reserve or vendor's right to bid.

The particulars or conditions of sale must state whether the land will be sold without reserve, or subject to a reserve price, or whether a right to bid is reserved, and, if the sale is without reserve, the vendor may not employ any person to bid at the sale, nor may the auctioneer knowingly accept any bidding from such a person<sup>1</sup>.

A sale subject to a reserve price and the reservation of a right to bid are distinct matters<sup>2</sup>, and a sale expressed to be subject to a reserve price or to a reserved bidding<sup>3</sup> does not give the vendor the right to bid by himself or his agent up to the reserve price<sup>4</sup>. Where the conditions expressly reserve the right to bid without further defining it, the vendor may bid himself or employ any one person to do so on his behalf<sup>5</sup>, and, if the vendor or his agent is to be at liberty to bid more than once<sup>6</sup> and beyond the reserve price, this should be expressly stated<sup>7</sup>.

1 Sale of Land by Auction Act 1867 s 5; and see AUCTION vol 2(3) (Reissue) PARA 242. The particulars or conditions need not use the words 'with reserve' or 'without reserve'; it is sufficient if it is made plain by the words used that the sale is subject to a reserve price: *Hills and Grant Ltd v Hodson* [1934] Ch 53.

2 Although the Sale of Land by Auction Act 1867 s 5 (as amended) is expressed in the alternative, the conditions may state that the sale is subject both to a reserve price and to a right to bid (*Gilliat v Gilliat* (1869) LR 9 Eq 60), and this is usually done: see PARA 84 ante.

3 *Gilliat v Gilliat* (1869) LR 9 Eq 60. See also *Notley v Salmon* (1853) 1 WR 240.

4 *Gilliat v Gilliat* (1869) LR 9 Eq 60.

5 See the Sale of Land by Auction Act 1867 s 6; and AUCTION vol 2(3) (Reissue) PARA 242. As to a condition reserving such a right see the Standard Conditions of Sale (3rd Edn), condition 2.3.3; and PARA 84 ante. As to the Standard Conditions of Sale see PARA 1 note 9 ante. Formerly a puffer (ie an agent to bid on behalf of the vendor) was not allowed at law, unless the sale was stated to be subject to a reserve. Whether it was stated to be without reserve, or whether the conditions were silent as to reserve, the employment of a puffer made the sale fraudulent and therefore voidable (*Howard v Castle* (1796) 6 Term Rep 642; *R v Marsh* (1829) 3 Y & J 331 (sale on behalf of Crown); *Thornter v Haines* (1846) 15 M & W 367 at 371; *Green v Baverstock* (1863) 10 Jur NS 47; *Mainprice v Westley* (1865) 11 Jur NS 975; *Mortimer v Bell* (1865) 1 Ch App 10), and it was the same in equity where the sale was stated to be without reserve (*Meadows v Tanner* (1820) 5 Madd 34; *Thornter v Haines* supra; *Robinson v Wall* (1847) 2 Ph 372). However, if the conditions were silent as to reserve, then, in equity, one puffer was allowed in order to prevent a sale at an under value: *Woodward v Miller* (1845) 2 Coll 279; *Flint v Woodin* (1852) 9 Hare 618; *Mortimer v Bell* supra; and see *Smith v Clarke* (1806) 12 Ves 477. Only one puffer was permitted since the employment of more could not be intended for protection against undervalue merely, but to enhance the price: *Smith v Clarke* supra; *Thornter v Haines* supra; *Mortimer v Bell* supra. Statutory form was given to the common law rule by the Sale of Land by Auction Act 1867 s 4, which provides that a sale of land by auction which would be invalid at law owing to the employment of a puffer is to be deemed invalid also in equity.

6 See *Parfitt v Jepson* (1877) 46 LJQB 529. The Standard Conditions of Sale (3rd Edn), condition 2.3.3, gives the right to bid up to the reserve price, which seems to imply the right to bid more than once: see PARA 84 ante.

7 See the Sale of Land by Auction Act 1867 s 6; and *Parfitt v Jepson* (1877) 46 LJQB 529 at 533 per Lindley J. Cf the Standard Conditions of Sale (3rd Edn), condition 2.3.3, which limits the right to bid to the reserve price: see PARA 84 ante.

## UPDATE

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## **B. DEPOSITS**

### **86. Payment of deposit.**

The Standard Conditions of Sale provide for a deposit of 10 per cent to be paid, no later than the date of the contract, to the vendor's solicitor as stakeholder<sup>1</sup>. If the payment is not made to the solicitor as stakeholder he receives it as agent for the vendor. Thus the payment is in effect payment to the vendor<sup>2</sup>, and cannot be recovered from the solicitor personally<sup>3</sup>. The deposit is not merely part payment, but a guarantee of the due performance of the contract<sup>4</sup> by the

purchaser. Hence it may be forfeited if the sale goes off owing to his default<sup>5</sup>. Interest on a deposit can be ordered where the court orders its return, but it may be refused by reason of the purchaser's conduct<sup>6</sup>. Failure by the purchaser to pay the deposit required by the contract entitles the vendor to repudiate the contract<sup>7</sup>. Despite such repudiation, the vendor may recover the unpaid deposit<sup>8</sup>. Where an estate agent receives a deposit before a contract has been concluded, he does not, in the absence of actual authority, receive it on the vendor's behalf; the vendor will not, normally, therefore, be liable for the agent's default<sup>9</sup>.

1 See the Standard Conditions of Sale (3rd Edn), condition 2.2.1. As to the Standard Conditions of Sale see PARA 1 note 9 ante. For the meaning of 'contract' see PARA 55 note 10 ante. 'Solicitor' includes barrister, duly certificated notary public, recognised licensed conveyancer and recognised body under the Administration of Justice Act 1985 s 9 or s 32: Standard Conditions of Sale (3rd Edn), condition 1.1.1(l); and see PARA 3 ante. See also *Wiggins v Lord* (1841) 4 Beav 30; *Ellis v Goulton* [1893] 1 QB 350, CA. Without such a stipulation no deposit could be demanded lawfully, as the whole consideration is not payable until completion, when the vendor has shown good title: *Binks v Lord Rokeby* (1818) 2 Swan 222. Payment of the deposit is not a condition precedent to the contract taking effect, but is a fundamental term of the contract, breach of which entitles the vendor to treat the contract as discharged: see *Millichamp v Jones* [1983] 1 All ER 267, [1982] 1 WLR 1422; *Damon Cia Naviera SA v Hapag-Lloyd International SA* [1985] 1 All ER 475, [1985] 1 WLR 435, CA; cf *Myton Ltd v Schwab-Morris* [1974] 1 All ER 326, [1974] 1 WLR 331. As to the authority of an auctioneer to receive the deposit see AUCTION vol 2(3) (Reissue) PARA 209. In the absence of special agreement an auctioneer receives the deposit as stakeholder: see *Harington v Hoggart* (1830) 1 B & Ad 577; and AUCTION vol 2(3) (Reissue) PARA 250. He is not justified in taking an IOU in payment of the deposit: see *Hodgens v Keon* [1894] 2 IR 657, Ir CA. As to payment by cheque or bill see *Morrow v Carty* [1957] NI 174 (where it was held that non payment of a deposit payable in cash justified a resale at the same auction); and AUCTION vol 2(3) (Reissue) PARA 209. Trustees who are selling are justified in allowing the deposit to be paid to the auctioneer as stakeholder: see 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 326. The Standard Conditions of Sale (3rd Edn) provide that, except on a sale by auction, payment is to be made by banker's draft or by a cheque drawn on a solicitors' clearing bank account: condition 2.2.1. 'Banker's draft' means a draft drawn by and on a clearing bank: condition 1.1.1(c). 'Clearing bank' means a bank which is a member of CHAPS Limited: condition 1.1.1(d). As to interest on the deposit see *Townshend v Townshend* (1826) 2 Russ 303; and the Standard Conditions of Sale (3rd Edn), condition 2.2.3. As to investment of the deposit see PARA 235 post.

Under the Standard Conditions of Sale (3rd Edn), if before the completion date the vendor agrees to buy another property in England and Wales for his residence, he may use all or any part of the deposit as a deposit in that transaction to be held on terms to the same effect as this condition and the Standard Conditions of Sale (3rd Edn), condition 2.2.3: condition 2.2.2. For the meaning of 'completion date' see PARA 102 note 5 post. Any deposit or part of a deposit not being used in accordance with condition 2.2.2 is to be held by the vendor's solicitor as stakeholder on terms that on completion it is paid to the vendor with accrued interest: condition 2.2.3. 'Accrued interest' means: (1) if money has been placed on deposit or in a building society share account, the interest actually earned; (2) otherwise, the interest which might reasonably have been earned by depositing the money at interest on seven days' notice of withdrawal with a clearing bank, less, in either case, any proper charges for handling the money: condition 1.1.1(a).

As to the position of a stakeholder see LEGAL PROFESSIONS vol 66 (2009) PARA 790. A solicitor may not pay rent out of a deposit held as stakeholder: *Dimurro v Charles Caplin & Co* (1969) 211 Estates Gazette 31.

2 *Bamford v Shuttleworth* (1840) 11 Ad & El 926; *Edgell v Day* (1865) LR 1 CP 80; *Ellis v Goulton* [1893] 1 QB 350, CA. See also LEGAL PROFESSIONS vol 66 (2009) PARA 790.

3 *Ellis v Goulton* [1893] 1 QB 350, CA. As to judicial definitions of the distinction between stakeholders and agent for the vendor see also *Burt v Claude Cousins & Co Ltd* [1971] 2 QB 426 at 435-436, [1971] 2 All ER 611 at 615, CA, per Lord Denning MR; *Potters (a firm) v Loppert* [1973] Ch 399 at 409, [1973] 1 All ER 658 at 664 per Pennycuik V-C; *Tudor v Hamid* [1988] 1 EGLR 251, [1987] NLJ Rep 79, CA.

4 In a completed contract: see RESTITUTION vol 40(1) (2007 Reissue) PARA 109; *Myton Ltd v Schwab-Morris* [1974] 1 All ER 326, [1974] 1 WLR 331.

5 See text and notes 6-8 infra; and PARA 234 et seq post.

6 See the Law Reform (Miscellaneous Provisions) Act 1934 s 3 (as amended) (see DAMAGES); *Ryan v Pilkington* (1959) as reported in 173 Estates Gazette 487 at 493, CA. As to interest generally see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1303 et seq. In *Public Trustee v Pearlberg* [1940] 2 KB 1 at 22, 25, [1940] 2 All ER 270 at 282, 284, CA, per Luxmoore LJ, the court refused to award interest by reason of the purchaser's conduct.

7 The payment of the deposit is a fundamental term of the contract (*Millichamp v Jones* [1983] 1 All ER 267, [1982] 1 WLR 1422; *Damon Cia Naviera SA v Hapag-Lloyd International SA* [1985] 1 All ER 475, [1985] 1 WLR



435, CA), not a condition precedent as held in *Myton Ltd v Schwab-Morris* [1974] 1 All ER 326, [1974] 1 WLR 331; See also *Pollway Ltd v Abdullah* [1974] 2 All ER 381, [1974] 1 WLR 493, CA; and the Standard Conditions of Sale (3rd Edn), condition 2.2 (see the text and note 1 supra, note 8 infra).

8 *Millichamp v Jones* [1983] 1 All ER 267, [1982] 1 WLR 1422; *Damon Cia Naviera SA v Hapag-Lloyd International SA* [1985] 1 All ER 475, [1985] 1 WLR 435, CA; and see *Lowe v Hope* [1970] Ch 94, [1969] 3 All ER 605, which is now discredited on this point. The Standard Conditions of Sale (3rd Edn) provide that, if a cheque tendered in payment of all or part of the deposit is dishonoured when first presented, the vendor may, within seven working days of being notified that the cheque has been dishonoured, give notice to the purchaser that the contract is discharged by the purchaser's breach: condition 2.2.4.

9 *Sorrell v Finch* [1977] AC 728, [1976] 2 All ER 371, HL.

## UPDATE

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Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/B. DEPOSITS/87. Forfeiture of deposit and resale.

#### 87. Forfeiture of deposit and resale.

The conditions of sale usually expressly provide that, where the purchaser fails to comply with the conditions, then, unless the court otherwise directs<sup>1</sup>, his deposit is to be forfeited<sup>2</sup> and the vendor is at liberty to resell the property and to recover from the original purchaser<sup>3</sup> any deficiency in price on a resale and also the costs of the resale or any attempted resale. Under such a condition the purchaser cannot call for an account of the surplus if a larger price is obtained on the resale<sup>4</sup>, and where the vendor does not succeed in reselling the property he can forfeit the deposit and recover the expenses of the abortive sale<sup>5</sup>. If the vendor seeks to recover the deficiency on the resale, he must bring into account the forfeited deposit<sup>6</sup>. Conditions are commonly inserted providing for the forfeiture of the deposit and resale on the purchaser's failure to comply with a notice to complete<sup>7</sup>.

1 See the Law of Property Act 1925 s 49(2); and PARA 246 post.

2 As to the right to forfeit a deposit in the absence of an express condition and the time when the right of forfeiture arises see PARAS 234-238 post.

3 See the Standard Conditions of Sale (3rd Edn), condition 7.2(a). As to the Standard Conditions of Sale see PARA 1 note 9 ante. It has been held that the vendor has a right of resale in the absence of express stipulation (*Noble v Edwardes*, *Edwardes v Noble* (1877) 5 ChD 378 at 388, CA), and the vendor must have a common law right of resale where he accepts a repudiatory breach by the purchaser (see *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL). The omission by a trustee to resell is not necessarily a breach of trust: *Thomson v Christie* (1852) 1 Macq 236 at 240, HL. A provision for forfeiture of instalments already paid is a penalty against which relief may be given: *Kilmer v British Columbia Orchard Lands Ltd* [1913] AC 319, PC; *Steedman v Drinkle* [1916] 1 AC 275, PC; and see *Brickles v Snell* [1916] 2 AC 599 at 605, PC. Relief was refused in *Mussen v Van Diemen's Land Co* [1938] Ch 253, [1938] 1 All ER 210; *Stockloser v Johnson* [1954] 1 QB 476, [1954] 1 All ER 630, CA. See also *Galbraith v Mitchenall Estates Ltd* [1965] 2 QB 473, [1964] 2 All ER 653; *Starside Properties Ltd v Mustapha* [1974] 2 All ER 567, [1974] 1 WLR 816, CA; and PARA 232 post.

An attempt to forfeit a deposit of 25% has been held void as a penalty: see *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573, [1993] 2 All ER 370, PC (the entire deposit was ordered to be returned, the court rejecting the argument that the vendor should be allowed to retain 10%; the vendor's remedy was damages to be assessed).

4 *Ex p Hunter* (1801) 6 Ves 94 at 97.

5 *Essex v Daniell, Daniell v Essex* (1875) LR 10 CP 538 at 548.

6 See PARA 233 post. After the resale he cannot sue the purchaser for the original purchase money: *Lamond v Davall* (1847) 9 QB 1030.

7 See the Standard Conditions of Sale (3rd Edn), condition 7.2(a), impliedly referring to condition 6.8.

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## C. FIXTURES, LEASES AND EASEMENTS

### 88. Timber and fixtures.

In the absence of special provision, a sale of land includes the fixtures and growing timber on it at the time of the sale<sup>1</sup>. Hence it is common, both in private sales and on sales by auction, to insert a condition that the fixtures and timber are to be taken at a price stated in the particulars or at a valuation to be made in a specified manner<sup>2</sup>. It is sometimes further provided that, failing such valuation, they are to be taken at a fair valuation or price. This last provision enables the court to direct a reference to ascertain the price<sup>3</sup>. In the absence of such a provision, it was formerly held that if the valuation could not be made in the manner specified the court would not interfere, since that would be to make a new contract for the parties<sup>4</sup>, but now it would seem that if the criteria for valuation are objectively applicable the court may, on failure of the stipulated machinery for valuation, substitute its own machinery<sup>5</sup>.

Under The National Conveyancing Protocol<sup>6</sup> the vendor must complete a detailed questionnaire<sup>7</sup>, specifying which items are to be included in the sale and which excluded<sup>8</sup>. Excluded chattels should then be specified and there is provision for a price to be attached to those chattels. Whether or not a separate price is to be paid for the chattels, the contract takes effect as a contract for the sale of goods<sup>9</sup>, and ownership of the chattels passes to the purchaser on actual completion<sup>10</sup>.

1 See *Colegrave v Dias Santos* (1823) 2 B & C 76. As to timber see FORESTRY vol 52 (2009) PARA 54 et seq; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 187 et seq. As to fixtures see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 172 et seq.

2 It used to be held that trustees cannot contract to sell property at a price to be fixed by valuation, since this is a delegation of their authority (*Peters v Lewes and East Grinstead Rly Co* (1880) 16 ChD 703 at 713 (on

appeal (1881) 18 ChD 429 at 437, CA); *Re Earl of Wilton's Settled Estates* [1907] 1 Ch 50 at 55), but trustees of land now have in relation to the land subject to the trust, for the purpose of exercising their function as trustees, all the powers of an absolute owner (Trusts of Land and Appointment of Trustees Act 1996 s 6(1)). However, the powers of the trustees can be restricted or excluded, or made subject to a consent: see s 8(1), (2); and TRUSTS vol 48 (2007 Reissue) PARA 1035. See also the Settled Land Act 1925 s 49(2); and SETTLEMENTS vol 42 (Reissue) PARA 832. The word 'timber' in the contract is to be taken as meaning timber properly so called: *Re Tower's Contract* [1924] WN 331; see FORESTRY vol 52 (2009) PARA 54. As to felling licences see FORESTRY vol 52 (2009) PARA 120 et seq.

3 See *Wilks v Davis* (1817) 3 Mer 507; *Morgan v Milman* (1853) 3 De GM & G 24.

4 See *Milnes v Gery* (1807) 14 Ves 400; *Blundell v Brettargh* (1810) 17 Ves 232; *Gourlay v Duke of Somerset* (1815) 19 Ves 429 at 430; *Wilks v Davis* (1817) 3 Mer 507; *Agar v Macklew* (1825) 2 Sim & St 418; *Morgan v Milman* (1853) 3 De GM & G 24; *Collins v Collins* (1858) 26 Beav 306; *Vickers v Vickers* (1867) LR 4 Eq 529; *Firth v Midland Rly Co* (1875) LR 20 Eq 100.

5 See *Sudbrook Trading Estate Ltd v Eggleton* [1983] 1 AC 444, [1982] 3 All ER 1, HL, specifically overruling *Agar v Macklew* (1825) 2 Sim & St 418, and *Vickers v Vickers* (1867) LR 4 Eq 529; see PARA 37 note 2 ante.

6 See PARA 19 ante.

7 This questionnaire is known as the Fixtures, Fittings and Contents Form. See the Standard Conditions of Sale (3rd Edn), Special Condition 4, which makes reference to this form. As to the Standard Conditions of Sale see PARA 1 note 9 ante.

8 See The National Conveyancing Protocol (3rd Edn, 1994), procedure 2.5; and PARA 19 ante.

9 See the Standard Conditions of Sale (3rd Edn), conditions 9.1, 9.2. For the meaning of 'contract' see PARA 55 note 10 ante.

10 See the Standard Conditions of Sale (3rd Edn), conditions 9.1, 9.3.

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### 89. Tenancies and easements.

It is usual to provide that the property is sold subject to the existing tenancies and to the rights of tenants under them<sup>1</sup>, to rights of way and water and other easements affecting it, and to other liabilities of a permanent or irremovable nature, such as restrictive covenants or rentcharges<sup>2</sup>. This condition does not absolve the owner from his duty to disclose to the purchaser all matters affecting the property which are within his knowledge<sup>3</sup>, and matters of the nature in question should, as far as practicable, be stated in the particulars, but such a condition does operate as a protection to the vendor if it subsequently appears that there is some right in favour of a third person of which he was ignorant at the date of the contract<sup>4</sup>.

In the case of a sale of agricultural land a condition should be included for the payment, in addition to the balance of the purchase money, of the outgoing valuation if the tenant is quitting at or near the time of completion<sup>5</sup>.

1 See *Re Earl of Derby and Fergusson's Contract* [1912] 1 Ch 479. As to notice of a tenant's claim to compensation under the Agricultural Holdings Act 1986 see AGRICULTURAL LAND vol 1 (2008) PARA 366; and as to conditions relating to such claims see the text and notes 3-5 infra.

2 As to matters affecting the property see the Standard Conditions of Sale (3rd Edn), condition 3; and PARA 55 ante. As to the Standard Conditions of Sale see PARA 1 note 9 ante. As to party walls see *Apostol v Simons* [1936] 1 All ER 207, CA; and BOUNDARIES vol 4(1) (2002 Reissue) PARA 961 et seq.

3 *Heywood v Mallalieu* (1883) 25 ChD 357; *Nottingham Patent Brick and Tile Co v Butler* (1886) 16 QBD 778 at 786, CA. As to such duty of disclosure see *Dougherty v Oates* (1900) 45 Sol Jo 119; *Simpson v Gilley* (1922) 92 LJ Ch 194; *Re Englefield Holdings Ltd and Sinclair's Contract* [1962] 3 All ER 503, [1962] 1 WLR 119; and PARAS 50, 55 ante. See also *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932, [1994] 1 WLR 1016, CA.

4 *Russell v Harford* (1866) LR 2 Eq 507 at 512. However, the condition only applies to rights available against the vendor; hence, where two lots are sold subject to the condition, a right of way acquired by the tenant of one lot against the tenant of the other is not by virtue of the condition perpetuated in favour of the purchaser of the former lot: *Daniel v Anderson* (1862) 31 LJ Ch 610; and see *Fahey v Dwyer* (1879) 4 LR Ir 271; *Delaparelle v St Martin-in-the-Fields Vestry* (1890) 34 Sol Jo 545.

5 See AGRICULTURAL LAND vol 1 (2008) PARA 366. On the determination of an agricultural tenancy, there may be payments both by the landlord and by the tenant, and it is the balance of these that is the outgoing valuation. If it is in favour of the landlord, the condition will not apply: see AGRICULTURAL LAND vol 1 (2008) PARA 366.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/D. TITLE TO FREEHOLDS/90. Commencement of title.

## D. TITLE TO FREEHOLDS

### 90. Commencement of title.

It is usual to specify the instrument with which the title is to commence<sup>1</sup>, and it is necessary to do so if the vendor wishes to deduce a title for less than the statutory period of 15 years<sup>2</sup>, or to commence his abstract within that period with an instrument which is not otherwise a good root of title<sup>3</sup>. A purchaser should, however, insist as far as possible on having the full statutory length of title, since he is deemed to have notice of everything that he would have discovered if he had insisted on and investigated the title for the statutory period<sup>4</sup>.

A condition that the abstract is to commence with a specified document does not preclude the purchaser from investigating the earlier title by another means if he can<sup>5</sup>. However, if the condition stipulates that the earlier title, whether appearing in any abstracted documents or not, is not to be required, investigated or objected to, this precludes inquiry and investigation

for every purpose<sup>6</sup>, although if the vendor allows the purchaser to inspect the deeds relating to the earlier title, and thus discloses to the purchaser some blot on the title, the purchaser is not precluded from raising the objection<sup>7</sup>.

1 In the Standard Conditions of Sale (3rd Edn), the root of title is to be specified in the special conditions: see Special Condition 3. As to the Standard Conditions of Sale see PARA 1 note 9 ante.

2 See PARA 139 post. As to the necessity of expressing such a condition in clear and unambiguous terms see PARA 78 ante.

3 See PARA 83 note 2 ante. As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 post.

4 *Re Cox and Neve's Contract* [1891] 2 Ch 109; *Re Nisbet and Potts' Contract* [1905] 1 Ch 391 (affd [1906] 1 Ch 386, CA). A purchaser is not deemed to be affected with notice of matters beyond the statutory period unless the purchaser has actually made investigation or inquiries (Law of Property Act 1925 s 44(8)), but it seems that this protection does not extend to matters of which he is to be treated as having actual notice by virtue of s 198(1) (as amended) (see EQUITY vol 16(2) (Reissue) PARA 577; LAND CHARGES vol 26 (2004 Reissue) PARA 693) (see the *Report of the Committee on Land Charges* (Cmd 9825) (1956) PARA 3; and cf *White v Bijou Mansions Ltd* [1937] Ch 610, [1937] 3 All ER 269 (affd on other grounds [1938] Ch 351, [1938] 1 All ER 546, CA)). As to the desirability of insisting on the full length of title where the property is to be mortgaged see PARA 1 note 12 ante.

5 *Sellick v Trevor* (1843) 11 M & W 722 at 728; *Darlington v Hamilton* (1854) Kay 550 at 558. This is so notwithstanding that the purchaser is prevented by the Law of Property Act 1925 s 45(1) (see PARAS 142, 150 post), from requiring production of documents dated or made before the time prescribed by law or fixed by agreement for the commencement of the title: see *Nottingham Patent Brick and Tile Co v Butler* (1885) 15 QBD 261 at 272 (affd (1886) 16 QBD 778, CA); *Re Nisbet and Potts' Contract* [1905] 1 Ch 391 (affd [1906] 1 Ch 386, CA).

6 *Hume v Bentley* (1852) 5 De G & Sm 520; *Re National Provincial Bank of England and Marsh* [1895] 1 Ch 190; *Re M'Lure and Garrett's Contract* [1899] 1 IR 225; *Re Earl of Arran and Knowlesden and Creer's Contract* [1912] 2 Ch 141. Such a condition is construed strictly, and its terms must be clear and unambiguous: *Waddell v Wolfe* (1874) LR 9 QB 515, where the language was held not sufficient to preclude objection to the earlier title.

7 *Warren v Richardson* (1830) You 1; *Smith v Robinson* (1879) 13 ChD 148. Nor does the condition exclude inquiry into a matter on the earlier title (eg a restrictive covenant) which is incorporated by reference in the title to be shown: *White v Hague* [1921] 1 IR 138. See also PARA 150 note 7 post.

## UPDATE

### 1-136 The Contract and Preliminary Matters

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Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/D. TITLE TO FREEHOLDS/91. Nature of title.

## 91. Nature of title.

The conditions usually state the nature of the title under which the vendor is selling. He may be selling as absolute owner by virtue of the powers incident to his ownership, and if so, he may be entitled free from incumbrances or subject to incumbrances. If he is entitled subject to

incumbrances, but these are to be cleared off on or before completion, there is no need to mention them in the conditions. They need only be mentioned if the purchaser is to take the property subject to them<sup>1</sup>.

If the vendor is not absolute owner, he will be selling by virtue of some statutory or other power or trust. If the property is settled land, the vendor will usually be the tenant for life or a person having the powers of a tenant for life, and he will sell under his statutory powers<sup>2</sup>. His right to exercise the statutory powers will, in the ordinary course, appear from a vesting instrument by which the property is declared to be vested in him on the trusts of the settlement<sup>3</sup>. On the other hand, the vendors may be trustees or trustees for sale selling under a trust created by deed or will. If the land is comprised in a personalty settlement, the settlement will usually have been created by a conveyance of the land on trust and a declaration by separate deed of the beneficial interests. The vendors will then make title under the conveyance on trust only and the purchaser will not be concerned with the declaration of trust<sup>4</sup>. If the trust was created by will, the vendors' title may be shown by an assent in their favour on trust, in which case the purchaser must ascertain that no notice of a previous assent or conveyance has been placed on or annexed to the probate, but is not otherwise concerned with the will<sup>5</sup>. The vendors may also be trustees holding on the statutory trusts arising where persons are beneficially entitled to land as tenants in common<sup>6</sup> or as joint tenants<sup>7</sup> or on other statutory or implied trusts<sup>8</sup>. In all cases of a trust of land, unless the trustee is a trust corporation, there must be two trustees to give a receipt for the purchase money<sup>9</sup>.

Other capacities in which the vendors may be selling are as personal representatives<sup>10</sup> or mortgagees<sup>11</sup>, and there may be other circumstances which affect the nature of the title, such as that the owner is suffering from mental disorder<sup>12</sup> or is a bankrupt<sup>13</sup>, or is a company in liquidation<sup>14</sup>, or that the property is subject to charitable trusts<sup>15</sup> or is partnership property<sup>16</sup>, or that the sale is being made by order of the court<sup>17</sup>.

1 As to the sale of incumbered land see PARA 267 post.

2 See the Settled Land Act 1925 ss 19, 20 (as amended), 38 (as amended); and SETTLEMENTS vol 42 (Reissue) PARAS 761 et seq, 827 et seq. A settlement created after 1 January 1997 takes effect as a trust of land and not as a settlement for the purposes of the Settled Land Act 1925: see the Trusts of Land and Appointment of Trustees Act 1996 s 2(1), which is subject to savings in s 2(2), (3). See also SETTLEMENTS vol 42 (Reissue) PARA 676.

3 See the Settled Land Act 1925 ss 4-6, 13 (as amended); and SETTLEMENTS vol 42 (Reissue) PARA 688 et seq. As to the effectiveness of a vesting deed giving effect to a settlement subsisting on 1 January 1926 see s 110(2) proviso; and SETTLEMENTS vol 42 (Reissue) PARA 886.

4 As to sales by trustees of land see the Law of Property Act 1925 ss 24, 27, 31, 33 (all as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 64 et seq; SETTLEMENTS vol 42 (Reissue) PARAS 896, 899-900, 906; TRUSTS vol 48 (2007 Reissue) PARAS 799, 822, 834, 1028. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

5 See the Administration of Estates Act 1925 s 36 (as amended); and EXECUTORS AND ADMINISTRATORS. The assent is sufficient unless the title as deduced shows the assent to have been wrong: *Re Duce and Boots Cash Chemists (Southern) Ltd's Contract* [1937] Ch 642, [1937] 3 All ER 788. As to assent see EXECUTORS AND ADMINISTRATORS. As to the need for a personal representative who is also a trustee to execute an assent in writing in his own favour see *Re King's Will Trusts, Assheton v Boyne* [1964] Ch 542, [1964] 1 All ER 833; and EXECUTORS AND ADMINISTRATORS. Owing to certain difficulties arising on the use of the statutory form of assent on trust contained in the Law of Property Act 1925 s 206, Sch 5 Form 9, it is the practice to assent to the property vesting in the trustees 'upon the trust in the said will contained'. In strictness this brings the will on the title in so far as it contains a trust, but so long as there is a recital of the will down to the trust and omitting the beneficial interests this raises no practical difficulty. As to the modification of Sch 5 Form 9 (in relation to covenants for title) see the Law of Property (Miscellaneous Provisions) Act 1994 s 9. As to the provisions of the Law of Property (Miscellaneous Provisions) Act 1994 relating to implied covenants for title see PARAS 349-351 post.

6 See REAL PROPERTY vol 39(2) (Reissue) PARA 207 et seq.

7 See PARA 74 ante.

8 See eg the Administration of Estates Act 1925 s 33 (as amended); and EXECUTORS AND ADMINISTRATORS.

9 See the Law of Property Act 1925 s 27(2) (as amended); and TRUSTS vol 48 (2007 Reissue) PARAS 799, 822. The restriction applies only to the receipt of the purchase money and does not prevent a legal estate vesting in a sole trustee nor his power to convey it if no receipt is required or a receipt is otherwise provided for: *Re Myhill, Hull v Myhill* [1928] Ch 100; *Re Wight and Best's Brewery Co Ltd's Contract* [1929] WN 11. Where land is sold and conveyed by a single trustee, the rights of the beneficiaries under the trust are not overreached, and the purchaser is bound by any such rights of which he has notice (or, in the case of registered land, are protected on the register or are overriding interests): see *Caunce v Caunce* [1969] 1 All ER 722, [1969] 1 WLR 286; *Williams and Glyn's Bank Ltd v Boland* [1981] AC 487, [1980] 2 All ER 408, HL. As to notice generally see EQUITY vol 16(2) (Reissue) PARA 576 et seq. As to the position where the title to land is registered see LAND REGISTRATION.

10 See generally EXECUTORS AND ADMINISTRATORS.

11 See generally MORTGAGE vol 77 (2010) PARA 101 et seq.

12 See PARA 72 ante.

13 See PARA 65 ante.

14 See PARA 67 ante.

15 See CHARITIES vol 8 (2010) PARA 395 et seq.

16 See *Re Fuller's Contract* [1933] Ch 652.

17 See PARAS 133-136 post.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/D. TITLE TO FREEHOLDS/92. Statement that title is to be made in a particular way.

#### 92. Statement that title is to be made in a particular way.

A statement that the title is to be made in some particular way is indicative only of the vendor's intention, and is not a warranty to make a good title in that way<sup>1</sup>. Hence, if the vendor cannot make title in the way stated, but has at the time of the contract power to make title in some other way<sup>2</sup>, or has such power before the purchaser has repudiated the contract<sup>3</sup>, the purchaser cannot object to the title.

1 *Re Spencer and Hauser's Contract* [1928] Ch 598 at 608. As to the avoidance of stipulations that title to the legal estate is to be made with the concurrence of persons entitled to an equitable interest see PARA 272 post.

2 *Re Spencer and Hauser's Contract* [1928] Ch 598 at 608 (statement that vendors would sell as trustees for sale; title made as personal representatives). See also *Re Baker and Selmon's Contract* [1907] 1 Ch 238 (sale as

'trustee'; no power of sale, but contract entered into at beneficiaries' request); *Re Atkinson and Horsell's Contract* [1912] 2 Ch 1 at 11, CA; *Brickles v Snell* [1916] 2 AC 599 at 608, PC.

3 *Re Hailes and Hutchinson's Contract* [1920] 1 Ch 233 (offer of concurrence of beneficiaries before repudiation by purchaser). A purchaser may object if a new title is offered depending on a conveyance by a person not bound to convey at the vendor's request (*Re Bryant and Barningham's Contract* (1890) 44 ChD 218, CA), and where the offer of the beneficiaries' concurrence is not made until after the time for completion has expired and long after repudiation by the purchaser (*Re Head's Trustees and Macdonald* (1890) 45 ChD 310, CA). Where a condition provides that the vendor is to convey such title as he has, but supported by evidence of 20 years' adverse possession, the condition is not satisfied by showing a good possessory title based on 12 years' possession: *George Wimpey & Co Ltd v Sohn* [1967] Ch 487, [1966] 1 All ER 232, CA. See also PARA 143 post.

## UPDATE

### 1-136 The Contract and Preliminary Matters

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### 93. Capacity of vendor.

It was formerly the practice for the conditions to define the capacity in which the vendor sold, since that capacity would define the extent of the implied covenants for title<sup>1</sup>. In dispositions made on or after 1 July 1995, the vendor will give either a full title guarantee or a limited title guarantee, and the conditions will state which kind of guarantee is given<sup>2</sup>.

1 As to covenants for title in general see PARAS 336-337 post; and as to the old law see PARAS 338-348 post.

2 As to the new law relating to implied covenants for title see PARAS 349-351 post.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

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### 94. Stipulation for acceptance of vendor's title.



A vendor may stipulate that the purchaser is to accept such title as the vendor has<sup>1</sup>. This condition does not relieve the vendor from the obligation of making out the best title he can from the material in his possession<sup>2</sup>. A purchaser is bound by such a condition even if the title proves defective<sup>3</sup>. If the conditions simply state the facts and stipulate that the purchaser is to take such title as the facts give, the purchaser must accept it whatever it be, but, if they go on to state as a positive fact that the vendor has power to sell, the purchaser may make further inquiries<sup>4</sup>. The purchaser is entitled to assume that the vendor has disclosed what it was his duty to disclose, and non-disclosure of the existence of onerous covenants affecting the property prevents the condition from being binding upon him<sup>5</sup>.

<sup>1</sup> See *Freme v Wright* (1819) 4 Madd 364; *Groom v Booth* (1853) 1 Drew 548; *Tweed v Mills* (1865) LR 1 CP 39.

<sup>2</sup> *Keyse v Hayden* (1853) 20 LTOS 244; *Hume v Pocock* (1866) 1 Ch App 379 at 385. Nor does it relieve the vendor of the duty of paying off a mortgage on the property: *Goold v Birmingham, Dudley and District Bank* (1888) 4 TLR 413.

<sup>3</sup> *Wilmut v Wilkinson* (1827) 6 B & C 506; *Duke v Barnett* (1846) 2 Coll 337; *Ashworth v Mounsey* (1853) 9 Exch 175. However, although the purchaser is bound at law, and therefore cannot recover his deposit, specific performance will not be ordered against him if he will not get a holding title: *Re Scott and Alvarez's Contract, Scott v Alvarez* [1895] 2 Ch 603, CA. See also *Re National Provincial Bank of England and Marsh* [1895] 1 Ch 190; cf *Lethbridge v Kirkman* (1855) 2 Jur NS 372. Now, where the court refuses to order specific performance, or in other circumstances where it considers it equitable, it can order the return of the deposit: see the Law of Property Act 1925 s 49(2); and PARA 246 post.

<sup>4</sup> See *Johnson v Smiley* (1853) 17 Beav 223. As to the obligation to show that a trust is being properly exercised see *Re O'Flanagan and Ryan's Contract* [1905] 1 IR 280 (condition stating defect of title; improper delegation of trust; vendor's right to refuse to complete). A condition excluding evidence of payment of a charge, where for more than 12 years there has been no payment or acknowledgment, is valid: *Hopkinson v Chamberlain* [1908] 1 Ch 853.

<sup>5</sup> *Re Haedicke and Lipski's Contract* [1901] 2 Ch 666; *Becker v Partridge* [1966] 2 QB 155, [1966] 2 All ER 266, CA. Cf *Blake v Phinn* (1847) 3 CB 976. As to the sale of an underlease see PARA 59 ante; and as to the duty to disclose see PARA 55 ante.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/D. TITLE TO FREEHOLDS/95. Title to rentcharges.

### 95. Title to rentcharges.

On the sale of a rentcharge<sup>1</sup> the conditions as to title may be similar to those on the sale of a lease<sup>2</sup>, although the purchaser may be required to accept as correct the description of the land out of which the rent issues and to accept counterparts or duplicates of the documents creating the rent and not to require production of the original or require evidence of due execution or stamping. He may also by the conditions be precluded from inquiring into the validity of any previous apportionment of the rentcharge<sup>3</sup>. Apportionment as to time on the sale of the

rentcharge must be provided for, and if there are any arrears of the rentcharge these will not pass unless special provision is made in the contract<sup>4</sup>. This provision should include power to recover the arrears in the vendor's name and a covenant that the arrears are due and unpaid. Where property is sold subject to a rentcharge<sup>5</sup>, it should be provided that the last receipt is to be conclusive evidence of the payment of the rent and the observance and performance of all the covenants and conditions in the conveyance creating the rentcharge and also that no proof is to be required of the title or authority of the person purporting to give the receipt<sup>6</sup>. The purchaser will be deemed to purchase with full knowledge of such covenants and conditions whether or not he inspects the deed. Where there is an overriding rentcharge not paid by the vendor, any requirement as to the apportionment of the rentcharge should be excluded. Where re-entry has been made upon the property charged with the rentcharge on account of non-payment, the conditions will usually stipulate that there is to be a statutory declaration by the vendor of undisturbed possession since the re-entry and that all questions by the purchaser as to the proper exercise of the power of re-entry are to be excluded. It is generally a term of such a condition that the purchaser is to assume that the re-entry vested in the vendor the interest in the property contracted to be sold.

1 As to rentcharges generally see RENTCHARGES AND ANNUITIES. As to the prohibition on the creation of new rentcharges see the Rentcharges Act 1977 s 2 (as amended); and RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 774.

2 See PARA 98 post. Rentcharges are sometimes sold in lots.

3 As to the apportionment of rentcharges generally see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 839 et seq.

4 *Salmon v Dean* (1851) 3 Mac & G 344.

5 As to implied covenants on the sale of property subject to a rentcharge see PARA 293 post.

6 The Law of Property Act 1925 s 45(2), which makes corresponding provision, applies only to leaseholds: see PARA 98 post.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/D. TITLE TO FREEHOLDS/96. Instruments of building and similar societies.

### 96. Instruments of building and similar societies.

Where the title includes an instrument to which a building society, friendly society or industrial and provident society was a party, it may be desirable to provide that no evidence is to be required as to the rules, constitution or incorporation of the society and that the purchaser is to assume without inquiry that any officer or trustee of the society signing a receipt was such an

officer as stated and that a receipt so signed is valid in all respects<sup>1</sup>. In some cases the condition is made to refer to receipts in the statutory form<sup>2</sup>.

1 There is no such provision in the Standard Conditions of Sale (3rd Edn). As to the Standard Conditions of Sale see PARA 1 note 9 ante. Where there is no such condition there may be occasions where it is necessary to supply a copy of the rules and of the certification of the rules in order to show that the instrument was duly executed. As to unincorporated building societies (the last of which attained corporate status in 1965) see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1856.

2 As to such receipts see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARAS 2197, 2496; MORTGAGE vol 77 (2010) PARAS 645, 646.

## UPDATE

### 1-136 The Contract and Preliminary Matters

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### 97. Stamping of documents.

In the absence of express stipulation, a purchaser is entitled to have all documents forming the vendor's title properly stamped at the vendor's expense<sup>1</sup>, and, as regards documents executed since 16 May 1888, any condition excluding this right on the part of the purchaser is void<sup>2</sup>. A stipulation that any unstamped or insufficiently stamped document is not to be stamped at once, but that the vendor will undertake to pay the penalty if it ever becomes necessary to stamp it seems not to be enforceable<sup>3</sup>.

1 *Whiting to Loomes* (1880) 14 ChD 822 (affd (1881) 17 ChD 10, CA), distinguished in *Ex p Birkbeck Freehold Land Society* (1883) 24 ChD 119 at 124, where the instrument was unnecessary for the protection of the purchaser's title, the defect being cured by obtaining the concurrence of an additional party. The right extends to a lease or tenancy agreement, subject to which the property is sold: *Smith v Wyley* (1852) 16 Jur 1136; *Coleman v Coleman* (1898) 79 LT 66. In *Re Weir and Pitt's Contract* (1911) 55 Sol Jo 536, it was held that a purchaser was not concerned with the sufficiency of the stamp where the consideration was apparently far less than the value of the property and the conveyance did not bear an adjudication stamp. See also *Lap Shun Textiles Industrial Co Ltd v Collector of Stamp Revenue* [1976] AC 530, [1976] 1 All ER 833, PC, where it was held that an instrument is liable to duty on its full valuation if it is proved to have been made for inadequate consideration, albeit that the purchaser dealt at arm's length and in good faith, but it was emphasised that such a case was exceptional and that there need be no change in the normal procedure for routine stamping on a stated consideration. See generally STAMP DUTIES AND STAMP DUTY RESERVE TAX. Where it appeared from an abstract of title that a deed was insufficiently stamped but on the original deed the consideration was seen to have been altered from an amount for which the deed was sufficiently stamped, the purchaser was held not to be bound to accept a statutory declaration that the alteration was made after the execution of the deed: *Re Spollon and Long's Contract* [1936] Ch 713, [1936] 2 All ER 711. Probates and letters of administration do not bear a stamp in respect of inheritance tax, but a certificate may be obtained showing that tax has been paid, and a purchaser need not question the sufficiency of the payment: *Tyrrell v Imperial Tobacco Co Ltd* [1926] IR 285, Ir CA. A purchaser now takes free from any charge for inheritance tax which is not registered as a land charge, or protected by notice on the register of title: see INHERITANCE TAXATION vol 24 (Reissue) PARA 686.

2 See the Stamp Act 1891 s 117; and STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1007.

3 See *Smith v Mawhood* (1845) 14 M & W 452; *Abbot v Stratton* (1846) 3 Jo & Lat 603 at 616; *Nixon v Albion Marine Insurance Co* (1867) LR 2 Exch 338. See also STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1007. Strictly speaking, a document not duly stamped cannot (except in criminal proceedings) be received in evidence or be available for any other purpose: see the Stamp Act 1891 s 14(4); and *Sun Alliance Insurance Ltd v IRC* [1972] Ch 133, [1971] 1 All ER 135 (court order which ought to have been stamped as a conveyance on sale). In practice, however, documents are usually admitted in evidence upon an undertaking given by the solicitor of the party producing them to have them stamped and to pay the penalty: see CIVIL PROCEDURE vol 11 (2009) PARA 959.

## UPDATE

### 1-136 The Contract and Preliminary Matters

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## **E. TITLE TO LEASEHOLDS AND PERFORMANCE OF COVENANTS**

### **98. Leaseholds generally.**

In the absence of any condition to the contrary in the contract of sale, a vendor of leaseholds is bound to produce the lease under which he holds, even though it was granted more than 15 years before the contract, as well as to show the intermediate title for 15 years<sup>1</sup>. If the lease has been lost, the vendor must by special condition relieve himself of the liability to produce the original lease<sup>2</sup>. Although the purchaser is precluded by statute from calling for the title to the freehold reversion in the case of a lease and to the leasehold reversion in the case of an underlease, these statutory provisions are subject to a contrary intention expressed in the contract<sup>3</sup> and may therefore be varied or excluded by a condition in the contract<sup>4</sup>. Conversely, the right of a purchaser who is precluded from calling for the freehold title to show by other means that there is an objection based on that title<sup>5</sup> can be excluded by a condition in the contract. If the property to be assigned is part only of the property comprised in the lease, and that part has not been previously assigned, apportionment of the rent payable must be provided for<sup>6</sup>, and, if that part has been previously assigned at an apportioned rent, all objection to such apportionment must be excluded. By a special condition a sale of an apportioned part of the property comprised in a lease can be carried out by underlease<sup>7</sup>. Where the landlord's consent to an assignment of a lease is required<sup>8</sup> the possibility of this being refused should be provided for<sup>9</sup>.

Upon production of the receipt for the last payment of rent due under the lease or underlease before the date of actual completion of the purchase, an intending purchaser of leaseholds is entitled to assume, unless the contrary appears, that all covenants and provisions of the lease or underlease have been performed and observed, and in the case of an underlease that all rent due under the underlease and every superior lease has been paid and all covenants and provisions performed and observed<sup>10</sup>. As this assumption is conditional on the contrary not appearing, a special condition to the effect that all breaches have been waived is sometimes inserted in a contract of sale, although on sale by private treaty objection is generally taken to

its insertion<sup>11</sup>. Such a condition should be extended to prevent the purchaser requiring any evidence of the right or title of the person by whom the receipt for rent purports to be given<sup>12</sup>. Where the lease does not reserve a rent or reserves only a nominal rent, a condition may be inserted in the contract that possession at the date of completion is to be conclusive evidence of the performance and observance of the lessee's covenants<sup>13</sup>. The conditions normally provide that a purchaser is deemed to have notice of matters contained in particular documents which are open to inspection<sup>14</sup>, but this gives only a limited protection<sup>15</sup>. The sale of property out of repair<sup>16</sup> or to a sitting tenant<sup>17</sup> requires additional conditions. Where the lease is made in consideration of the surrender of an earlier lease all questions as to the title to the surrendered lease should be excluded by special condition, because otherwise the vendor may be required not only to produce the surrendered lease on a sale of the new lease but to show that at the date of the grant of the new lease the lessee was entitled to the surrendered term<sup>18</sup>.

1 As to title to leaseholds generally see PARA 140 post. Although the purchaser is entitled to this and no more apart from any special condition, a special condition to this effect is usually inserted in the contract of sale. As to the importance to the purchaser of seeing the lease see PARA 8 ante.

2 See *Frend v Buckley* (1870) LR 5 QB 213 at 216. The condition should exclude all inquiry as to the terms of the lease otherwise than as they may appear from any abstract of the lease or assignment of the lease in the vendor's possession or can be shown by statutory declaration. Such a statutory declaration is commonly at the purchaser's expense. See the Standard Conditions of Sale (3rd Edn), conditions 8.1.1, 8.1.2; and note 14 infra. As to the Standard Conditions of Sale see PARA 1 note 9 ante.

3 See the Law of Property Act 1925 s 44(2), (3), (11); and PARA 140 post.

4 Where the sale is by assignment of an existing lease, the Standard Conditions of Sale (3rd Edn) do not contain any provision for deduction of the superior title. However, if the term of a new lease will exceed 21 years, the vendor must deduce a title which will enable the purchaser to register the lease at HM Land Registry with an absolute title: condition 8.2.4. For the meaning of 'lease' see PARA 57 note 5 ante.

5 See PARA 140 post.

6 See the Standard Conditions of Sale (3rd Edn) which provide that the fact that a rent or rent charge, whether payable or receivable by the owner of the property, has been or will on completion be, informally apportioned is not to be regarded as a defect in title: condition 4.4.

7 Except where the property is divided into several parts, recourse to this method is not generally adopted.

8 As to the vendor's duty to obtain any necessary consent see PARA 25 ante; and as to the time within which consent must be procured see PARA 240 post.

9 See the Standard Conditions of Sale (3rd Edn), condition 8.3. Where the consent is required by the lease, it is not open to the purchaser to waive that requirement in the expectation of being able to obtain an assignment without consent: see *Lipmans Wallpaper Ltd v Mason and Hodgkinton Ltd* [1969] 1 Ch 20, [1968] 1 All ER 1123. See also *Bickel v Courtenay Investments (Nominees) Ltd* [1984] 1 All ER 657, [1984] 1 WLR 795; *29 Equities Ltd v Bank Leumi (UK) Ltd* [1987] 1 All ER 108, CA.

10 See the Law of Property Act 1925 s 45(2), (3). Unless the contrary appears the purchaser must also assume that the lease, or the underlease and every superior lease, was duly granted: see s 45(2), (3).

11 See *Bull v Hutchens* (1863) 32 Beav 615; *Lawrie v Less* (1881) 7 App Cas 19 at 32, HL; *Re Highett and Bird's Contract* [1903] 1 Ch 287, CA; *Re Taunton and West of England Perpetual Benefit Building Society and Roberts' Contract* [1912] 2 Ch 381. An assignor cannot make a good title under an open contract where he has not complied with a dilapidation notice: *Re Martin, ex p Dixon (Trustee) v Tucker* (1912) 106 LT 381. If the vendor is aware of any breach of covenant, he should disclose it and expressly stipulate for its waiver to be assumed. As to the difficulties which may arise in the absence of such a stipulation, cf *Simmons v Pennington & Son (a firm)* [1955] 1 All ER 240, [1955] 1 WLR 183, CA; and PARA 52 ante. A condition requiring that the waiver of breaches be assumed does not cover breaches committed by the vendor after contract: *Howell v Kightley* (1856) 21 Beav 331; affd (1856) 8 De GM & G 325. A vendor who has expressly agreed to make a good title cannot give oral evidence that the purchaser was aware of breaches of covenant existing at the time of the contract: *Barnett v Wheeler* (1841) 7 M & W 364. See also *Re Allen and Driscoll's Contract* [1904] 2 Ch 226, CA, explaining *Re Highett and Bird's Contract* [1903] 1 Ch 287, CA. In the absence of express agreement the vendor can give evidence of the purchaser's knowledge, and then the breaches are not an objection to the title: *Clarke*

*v Coleman* [1895] WN 114, CA. See further PARA 59 ante. As to the sale of leaseholds out of repair see PARA 99 post.

12 Without such an extension, the purchaser would be entitled to have the title traced from the original lessor to the person giving the receipt, notwithstanding that he is precluded by statute (see the text and notes 1-9 supra; and PARA 140 post) from investigating the title to the reversion: cf *Pegler v White* (1864) 33 Beav 403.

13 There is no such provision in the Standard Conditions of Sale (3rd Edn).

14 See the Standard Conditions of Sale (3rd Edn) which provide that, the vendor having provided the purchaser with copies of the documents embodying the lease terms, the purchaser is treated as entering into the contract knowing and fully accepting those terms: condition 8.1.2. For the meaning of 'contract' see PARA 55 note 10 ante.

15 Cf *Simmons v Pennington & Son (a firm)* [1955] 1 All ER 240, [1955] 1 WLR 183, CA; and PARA 52 ante.

16 See PARA 99 post.

17 See PARA 127 post.

18 See *Hodgkinson v Cooper* (1846) 9 Beav 304.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/E. TITLE TO LEASEHOLDS AND PERFORMANCE OF COVENANTS/99. Leaseholds out of repair.

### 99. Leaseholds out of repair.

Prior to 1 July 1995<sup>1</sup>, the covenant implied by the assignment of leaseholds as beneficial owner includes a covenant by the assignor that the covenants in the lease have been performed and observed<sup>2</sup>. After 1 July 1995, where the disposition is of leasehold land and is expressed to be made with full title guarantee or with limited title guarantee, the following covenants are implied: (1) that the lease is subsisting at the time of the disposition; and (2) that there is no subsisting breach of a condition or tenant's obligation, and nothing which at that time would render the lease liable to forfeiture<sup>3</sup>. Where the lease includes a covenant to repair, there will be a breach of the implied covenant if the premises are out of repair. The fact that the purchaser knows of the breach is immaterial as the covenant is unqualified<sup>4</sup>. Where, however, there is a condition that the purchaser is deemed to have notice of the actual condition of the property and is to take it as it is<sup>5</sup>, it is clear that the implication that the covenant to repair has been performed is contrary to the intention of the parties and the purchaser is entitled to have the assignment rectified, although if the purchaser has subsequently sold the property the rectification must be without prejudice to the rights of purchasers for value without notice of the right to rectification<sup>6</sup>. There should in such cases be a condition that the transfer is to contain a modification of the implied covenants for title so as to exclude any implication that

the lease has not become voidable by reason of the covenants for repair and decoration not having been performed<sup>7</sup>.

1 The date on which the Law of Property (Miscellaneous Provisions) Act 1994 came into force: see PARA 337 post.

2 See PARA 301 post. As to the power to modify the implied covenants for title see PARA 294 post.

3 Law of Property (Miscellaneous Provisions) Act 1994 s 4(1). If the disposition is the grant of an underlease, the references to 'the lease' in s 4(1) are references to the lease out of which the underlease is created: s 4(2).

4 *Butler v Mountview Estates Ltd* [1951] 2 KB 563, [1951] 1 All ER 693.

5 The Standard Conditions of Sale (3rd Edn) provide that the purchaser accepts the property in the physical state it is in at the date of the contract unless the vendor is building or converting it (condition 3.2.1), and a leasehold property is sold subject to any subsisting breach of a condition or tenant's obligation relating to the physical state of the property which renders the lease liable to forfeiture (condition 3.2.2). For the meaning of 'contract' see PARA 55 note 10 ante; and for the meaning of 'lease' see PARA 57 note 5 ante.

6 *Butler v Mountview Estates Ltd* [1951] 2 KB 563, [1951] 1 All ER 693.

7 As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

## UPDATE

### 1-136 The Contract and Preliminary Matters

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## F. ABSTRACT OF TITLE

### 100. Delivery of abstract.

Although, independently of any condition for that purpose, a vendor of unregistered land<sup>1</sup> is bound to deliver an abstract of title<sup>2</sup>, and to do so within a reasonable time<sup>3</sup>, the Standard Conditions of Sale provide for the delivery of an abstract to the purchaser or his solicitor<sup>4</sup>, or an epitome of title with photocopies of the relevant documents, immediately after making the contract<sup>5</sup>. Delivery within such time is not of the essence of the contract<sup>6</sup>, and it is for the purchaser, on default by the vendor, to insist on the abstract or epitome being sent. If he neglects to apply for it on the day fixed for its delivery<sup>7</sup>, or within such a period as will leave time for completion of the contract on the agreed day<sup>8</sup>, or if, upon its being tendered after that time, he receives it without demur<sup>9</sup>, he will be held to have waived the condition. If, however, the vendor fails to deliver an abstract or epitome on being pressed by the purchaser to do so, the purchaser can treat the contract as at an end as soon as a reasonable time for delivery has expired<sup>10</sup>.

1 As to unregistered land see PARA 138 post.

2 As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 post.

3 *Compton v Bagley* [1892] 1 Ch 313. In case of unreasonable delay, the purchaser should give the vendor notice in writing, fixing a reasonable time within which a proper abstract must be delivered, whereupon the vendor's failure to deliver accordingly will entitle the purchaser to rescind the contract and recover his deposit: *Compton v Bagley* supra. See also *Bond v Bassett* (1917) 87 LJ Ch 160; *Re Bayley and Shoemith's Contract* (1918) 87 LJ Ch 626. As to rescission see further PARA 232 et seq post. What is a reasonable time is perhaps a matter of doubt as the courts have shown a tendency to require a longer time than was formerly thought to be reasonable: see *Re Barr's Contract, Moorwell Holdings Ltd v Barr* [1956] Ch 551, [1956] 2 All ER 853, decided on the National Conditions of Sale (16th Edn), condition 23. Cf The Law Society's General Conditions of Sale (1980 Edn), condition 23, the National Conditions of Sale (20th Edn), condition 22, and the Conveyancing Lawyers' Conditions of Sale, condition 20. As to the Conditions of Sale see PARA 1 note 9 ante.

4 See PARA 3 ante.

5 See *Steer v Crowley* (1863) 14 CBNS 337; and the Standard Conditions of Sale (3rd Edn), conditions 4.1.1, 4.2.2, 4.2.3. As to the Standard Conditions of Sale see PARA 1 note 9 ante.

6 *Roberts v Berry* (1853) 3 De GM & G 284. Formerly, such time was regarded at law as of the essence of the contract, and non-delivery of the abstract within that time relieved the purchaser from the contract and entitled him to the return of his deposit (*Berry v Young* (1788) 2 Esp 640n; *Wilde v Fort* (1812) 4 Taunt 334), but now time is not of the essence of the contract unless it would be so treated in equity (see PARA 120 text and note 2 post). In the case of a willing vendor and purchaser, conditions as to the delivery of the abstract or epitome are commonly disregarded. It is only where difficulties arise that they become of any importance.

7 *Guest v Homfray* (1801) 5 Ves 818.

8 *Jones v Price* (1797) 3 Anst 724.

9 *Smith v Burnam* (1795) 2 Anst 527. Cf *Oakden v Pike* (1865) 34 LJ Ch 620 at 621; *Re Priestley and Davidson's Contract* (1892) 31 LR Ir 122.

10 See *Venn v Cattell* (1872) 27 LT 469. See also *Pincke v Curteis* (1793) 4 Bro CC 329; *Seton v Slade*, *Hunter v Seton* (1802) 7 Ves 265; *Magennis v Fallon* (1828) 2 Mol 561 at 576; *Hipwell v Knight* (1835) 1 Y & C Ex 401.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/F. ABSTRACT OF TITLE/101. Effect on requisitions of failure to deliver abstract or epitome.

#### 101. Effect on requisitions of failure to deliver abstract or epitome.

In the absence of contrary provision in a condition, failure to deliver the abstract or epitome in relation to unregistered land within the specified time relieves the purchaser from any condition binding him to make his requisitions or objections within a given period after delivery of the abstract or epitome<sup>1</sup>. The standard conditions provide that the time for written requisitions<sup>2</sup> is six working days<sup>3</sup> after either the date of the contract<sup>4</sup> or the date of delivery of



the vendor's evidence of title, whichever is the later<sup>5</sup>. Under such a condition, where the abstract or epitome is not perfect but the deficiencies are unimportant, in the sense that the purchaser ought to assume that the gaps will be filled in a way which he would expect from the information supplied in the abstract or epitome, time begins to run against the purchaser; he must therefore raise what requisitions he can on the abstract submitted, call for the gaps to be filled, and he will then be entitled within the time prescribed by the condition to raise further requisitions on the new material<sup>6</sup>.

1 See *Upperton v Nickolson* (1871) 6 Ch App 436; *Re Todd and M'Fadden's Contract* [1908] 1 IR 213. See also *Southby v Hutt* (1837) 2 My & Cr 207 at 211. As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 post.

2 'Requisition' includes objection: Standard Conditions of Sale (3rd Edn), condition 1.1.1(k). As to the Standard Conditions of Sale see PARA 1 note 9 ante.

3 'Working day' means any day from Monday to Friday (inclusive) which is not Christmas Day, Good Friday or a statutory Bank Holiday: Standard Conditions of Sale (3rd Edn), condition 1.1.1(n).

4 For the meaning of 'contract' see PARA 55 note 10 ante.

5 See the Standard Conditions of Sale (3rd Edn), condition 4.1.1; and PARA 102 post.

6 See *Ogilvy v Hope-Davies* [1976] 1 All ER 683. See the Standard Conditions of Sale (3rd Edn), condition 4.1.1; and PARA 102 post.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

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## G. REQUISITIONS

### 102. Time for requisitions.

The Standard Conditions of Sale provide that any requisition<sup>1</sup> arising on the vendor's evidence of title<sup>2</sup> is to be made within six working days<sup>3</sup> after either the date of the contract<sup>4</sup> or the date of the delivery of the vendor's evidence of title on which the requisitions are raised whichever is the later. The time limit on the vendor's right to raise requisitions applies even where the vendor supplies incomplete evidence of his title, but the purchaser may, within six working days from delivery of any further evidence, raise further requisitions arising from that evidence. On the expiry of the relevant time limit the purchaser loses the right to raise requisitions or make observations. The vendor must reply in writing within four working days after receiving the requisitions, and the purchaser may make written observations on the vendor's replies within three working days after receiving the replies<sup>5</sup>. The purchaser is not precluded from making any requisition as to matters subsequently discovered which were not disclosed on the face of the abstract or epitome, even if the time has expired<sup>6</sup>. Upon the

delivery of a supplementary abstract or epitome, a requisition based upon that abstract<sup>7</sup> or epitome is an original requisition for the purposes of these time limits and the time for requisitions starts again<sup>8</sup>.

1 For the meaning of 'requisition' see PARA 101 note 2 ante; and as to the contents of requisitions see PARAS 163-165 post.

2 As to the root of title see PARA 142 post.

3 For the meaning of 'working day' see PARA 101 note 3 ante.

4 For the meaning of 'contract' see PARA 55 note 10 ante.

5 See the Standard Conditions of Sale (3rd Edn), condition 4.1.1. As to the Standard Conditions of Sale see PARA 1 note 9 ante. Where the period between the date of the contract and the completion date is less than 15 working days, these time limits are to be reduced proportionately: see condition 4.1.4. See also the Statutory Form of Conditions of Sale 1925, SR & O 1925/779, condition 6(1) (14 days). A condition sometimes provides expressly that every requisition and objection not so stated is to be considered as waived: see *Blackburn v Smith* (1848) 2 Exch 783; *Smithson v Powell*, *Powell v Smithson* (1852) 20 LTOS 105. However, even without such a condition, the present standard conditions seem strong enough to imply a waiver: see *Sinclair-Hill v Sothcott* (1973) 26 P & CR 490. It has been said that in this condition time is of the essence of the contract without express words to that effect: *Oakden v Pike* (1865) 11 Jur NS 666. As to a consideration of when the law regards time as of the essence of the contract see PARA 120 post.

The Standard Conditions of Sale (3rd Edn) provide that the completion date is 20 working days after the date of the contract but time is not of the essence of the contract unless a notice to complete has been served: conditions 1.1.1(e), 6.1.1. It seems arguable that the time limits in condition 4.1 do make time of the essence. 'Notice to complete' means any notice, order or proposal given or made (whether before or after the date of the contract) by a body acting on statutory authority: condition 1.1.1(i).

If there is no stipulation as to time, the purchaser must make his objections within a reasonable time after the delivery of the abstract: *Spurrier v Hancock* (1799) 4 Ves 667. In the event of unreasonable delay, the vendor can, by notice, limit a reasonable time for sending in objections, and, upon the purchaser's default, rescind the contract (*Taylor v Brown* (1839) 2 Beav 180), or the purchaser may perhaps be assumed to have accepted the title (*Pegg v Wisden* (1852) 16 Beav 239 at 244). As to waiver of the conditions by the vendor see *Cutts v Thodey* (1842) 13 Sim 206 (affd (1844) 1 Coll 223n); *Ogilvy v Hope-Davies* [1976] 1 All ER 683; *Luck v White* (1973) 26 P & CR 89; and as to waiver by the purchaser see *Re Ossemsley Estates Ltd* [1937] 3 All ER 774, CA. If the vendor shows by his conduct that he is unwilling to deal with a substantial requisition, for example by serving a notice to complete by which he impliedly asserts that he has provided a title in accordance with the contract, the purchaser is entitled to repudiate the contract immediately: *Re Stone and Saville's Contract* [1963] 1 All ER 353, [1963] 1 WLR 163, CA.

6 See *Warde v Dixon* (1858) 28 LJ Ch 315. See also *Gray v Fowler* (1873) LR 8 Exch 249 at 267; *Simpson v Gilley* (1922) 92 LJ Ch 194. Consequently, the purchaser is not precluded from taking an objection arising out of evidence called for before, but supplied by the vendor after, the expiration of the time fixed: *Blacklow v Laws* (1842) 2 Hare 40.

7 As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 post.

8 See *Re Ossemsley Estates Ltd* [1937] 3 All ER 774, CA; *Ogilvy v Hope-Davies* [1976] 1 All ER 683. See also *Sherwin v Shakspear* (1854) 5 De GM & G 517 at 536. This is so where the supplementary abstract is no more than an answer to a requisition: *Re Ossemsley Estates Ltd* supra.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/G. REQUISITIONS/103. Position where the vendor's title is wholly bad.

### **103. Position where the vendor's title is wholly bad.**

A condition limiting the time for requisitions or objections does not apply where the vendor's title is wholly bad; it merely applies to such requirements as might have been properly enforced against a vendor who had a valid title<sup>1</sup>. Hence it cannot be used to force a bad title on a purchaser who has made his requisitions as to title too late<sup>2</sup>, and he is entitled to recover his deposit<sup>3</sup>. Moreover, such a condition cannot be used where the contract is misleading, for example where a vendor purports to sell registered land without disclosing that his title is only possessory<sup>4</sup>.

1 *Want v Stallibrass* (1873) LR 8 Exch 175 at 185.

2 *Re Tanqueray-Willaume and Landau* (1882) 20 ChD 465, CA; *Want v Stallibrass* (1873) LR 8 Exch 175; *Saxby v Thomas* (1890) 64 LT 65 at 67, CA. In *Pryce-Jones v Williams* [1902] 2 Ch 517, a distinction was made between requisitions as to the root of title and requisitions as to the subsequent devolution of the title, and it was held that the latter cannot be insisted on if made out of time; but it seems that the true distinction is between matters which would vitiate the title and mere technical objections when a good holding title is shown. See also *Cumberland Court (Brighton) Ltd v Taylor* [1964] Ch 29, [1963] 2 All ER 536.

3 *Want v Stallibrass* (1873) LR 8 Exch 175. However, he cannot recover his deposit if he can show the want of title only by means of inquiries which he is precluded by the contract from making: *Rosenberg v Cook* (1881) 8 QBD 162, CA. As to the recovery of the deposit see PARAS 245-246 post.

4 *Re Brine and Davies' Contract* [1935] Ch 388. As to misleading conditions see PARA 83 ante.

## **UPDATE**

### **1-136 The Contract and Preliminary Matters**

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Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/G. REQUISITIONS/104. Rescission on requisition being pressed.

### **104. Rescission on requisition being pressed.**

A condition may provide that, if the purchaser insists on any requisition or objection as to title which the vendor is unable or on some reasonable ground unwilling to remove or comply with, then, notwithstanding any intermediate negotiation or litigation, or any attempt to remove or comply with the same, the vendor may by notice in writing<sup>1</sup> annul the sale upon returning the deposit, and the purchaser is to return the abstract and any other documents furnished to him<sup>2</sup>.

When the condition is framed solely in this way, it applies only to objections as to title and not to objections as to conveyance<sup>3</sup>. Thus the condition covers an objection in respect of an undisclosed right of way<sup>4</sup>, or for want of title to minerals<sup>5</sup>, or a requisition that the land should

be released from a rentcharge<sup>6</sup>. However, the condition is frequently framed so as to cover also requisitions and objections as to conveyance, such as an objection to the conveyance being made subject to covenants and restrictions the existence of which did not appear from the particulars or the abstract<sup>7</sup>. Although the condition does not in terms refer to requisitions as to conveyance, yet, if it is expressed to include objections as to the title, particulars, conditions, and any other matter or thing relating to the sale, it is construed to include requisitions as to conveyance<sup>8</sup>.

1 A notice to rescind signed 'without prejudice' seems to be void: *Re Weston and Thomas's Contract* [1907] 1 Ch 244 at 248.

2 The Standard Conditions of Sale (3rd Edn) do not contain such a condition. As to the Standard Conditions of Sale see PARA 1 note 9 ante. A demand for an unincumbered title is not persisting in objection to the title: see *Leominster Properties Ltd v Broadway Finance Ltd* (1981) 42 P & CR 372. See also *M'Culloch v Gregory* (1855) 1 K & J 286. The condition mentioned in the text is not unduly depreciatory (*Falkner v Equitable Reversionary Society* (1858) 4 Drew 352), even if it is unreasonable from the purchaser's point of view (*Moeser v Wisker* (1871) LR 6 CP 120 at 124). A right of rescission reserved by the contract cannot be used to prevent the purchaser enforcing any right conferred by the Law of Property Act 1925 s 42 (as amended) (such as refusing to take a conveyance with the concurrence of the owners of equitable interests): see s 42(8). The right may, however, be reserved in case the vendor is unable to obtain the cancellation of a registered incumbrance or the concurrence of the person entitled: s 43(2). As to rescission apart from condition and as to forfeiture of the deposit see PARA 232 et seq post; and as to rescission after completion see PARA 356 et seq post. As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 post.

3 As to the distinction see further PARAS 164-165 post.

4 *Ashburner v Sewell* [1891] 3 Ch 405 at 410. The condition does not, however, cover an objection to a misdescription: *Price v Macaulay* (1852) 2 De GM & G 339.

5 *Mawson v Fletcher* (1870) 6 Ch App 91.

6 *Re Great Northern Ry Co and Sanderson* (1884) 25 ChD 788, where, on the ground of hardship, the court refused to compel the vendor to apply for the discharge of the incumbrance under what is now the Law of Property Act 1925 s 50: see PARA 268 post. See also *Page v Adam* (1841) 4 Beav 269, where the condition applied to a requisition that annuitants should join in the conveyance. Annuities would now usually be overreached by a transfer: see PARA 271 post. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

7 *Re Monckton and Gilzean* (1884) 27 ChD 555. Formerly the condition was used in order to exclude requisitions as to getting in a legal estate (*Kitchen v Palmer* (1877) 46 LJ Ch 611; and see *Jumpson v Pitchers* (1844) 1 Coll 13); but now the vendor would have to do this, although, perhaps, the condition may still be effective as regards an outstanding day of a term (see *Re Scott and Eave's Contract* (1902) 86 LT 617).

8 *Re Deighton and Harris's Contract* [1898] 1 Ch 458 at 463, CA. For the view that it is improper for a rescission clause to apply to requisitions both as to title and as to conveyance see *Hardman v Child* (1885) 28 ChD 712 at 718 per Pearson J.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

## 105. Circumstances in which right of rescission arises.

Where the condition enables the vendor to rescind upon the purchaser insisting upon<sup>1</sup> or persisting in any requisition, there must be: (1) an objection by the purchaser; (2) inability or unwillingness on a reasonable ground on the part of the vendor to remove the objection<sup>2</sup>; (3) communication to the purchaser of the existence of this unwillingness or inability; and (4) insistence by the purchaser upon his objection notwithstanding this communication<sup>3</sup>. When, however, in the condition the words 'make an objection' or 'make or take an objection' are substituted for 'insist upon an objection', the vendor's right to rescind arises directly the requisitions are sent in, and he need not attempt any answer<sup>4</sup>.

1 'This reply is unsatisfactory and the purchasers reserve the right to insist' is a sufficient insistence: see *Re Dames and Wood* (1885) 29 ChD 626 at 631, CA.

2 See *Re Stone and Saville's Contract* [1963] 1 All ER 353, [1963] 1 WLR 163, CA.

3 *Duddell v Simpson* (1866) 2 Ch App 102 at 109. The vendor must attempt to answer the requisition so as to give the purchaser the opportunity either of waiving it or of insisting upon it: *Greaves v Wilson* (1858) 25 Beav 290; *Turpin v Chambers* (1861) 29 Beav 104.

4 *Re Starr-Bowkett Building Society and Sibun's Contract* (1889) 42 ChD 375, CA.

### UPDATE

#### 1-136 The Contract and Preliminary Matters

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## 106. Exercise of right of rescission.

The vendor must exercise the right of rescission reasonably and in good faith, and not arbitrarily or capriciously<sup>1</sup>. However, provided he has a good reason for rescinding, he is not bound to state it to the purchaser<sup>2</sup>. If the requisition is one which the vendor may reasonably be expected to comply with, he cannot resort to his power to rescind<sup>3</sup>. If the vendor has a sufficient reason for rescinding under the condition, but has knowingly or recklessly made a material misrepresentation concerning the property, he cannot rescind so as to deprive the purchaser of his option either to rescind or to enforce the contract with compensation<sup>4</sup>.

The right to rescind should be exercised within a reasonable time<sup>5</sup>, and, if the vendor seeks to take any unfair advantage of it, for example by delaying to exercise it whilst negotiating for a sale to a third person, he loses his election to affirm the contract and the purchaser may treat it as rescinded<sup>6</sup>. Where the vendor fails to show any title whatever, he cannot rescind under the condition so as to avoid liability to the purchaser<sup>7</sup>.

1 *Re Dames and Wood* (1885) 29 ChD 626 at 630, CA; *Re Glenton and Saunders to Haden* (1885) 53 LT 434, CA; *Re Terry and White's Contract* (1886) 32 ChD 14; *Re Simpson and Thomas Moy Ltd's Contract* (1909) 53 Sol Jo 376. The burden of proof seems to lie on the purchaser. Where the vendor states the reasons in his notice, and is not cross examined as to his good faith, to which he has sworn, and there is no evidence imputing bad faith or caprice, the court does not infer against him an unreasonable or capricious use of the power: see *Re Starr-Bowkett Building Society and Sibun's Contract* (1889) 42 ChD 375 at 383-384, CA. If the right to rescind is exercised in pursuance of a clause in the contract or a condition in the standard conditions of sale, any notice to rescind should expressly refer to that clause or condition. As to the Standard Conditions of Sale see PARA 1 note 9 ante.

2 *Re Glenton and Saunders to Haden* (1885) 53 LT 434, CA. See also *Woolcott v Peggie* (1889) 15 App Cas 42, PC. Any difficulty in which this may place the purchaser is due to his own fault in entering into a contract in such a form: *Re Glenton and Saunders to Haden* supra; *Re Starr-Bowkett Building Society and Sibun's Contract* (1889) 42 ChD 375, CA.

3 *Re Weston and Thomas's Contract* [1907] 1 Ch 244 (requisition for commutation of succession duty); *Quinion v Horne* [1906] 1 Ch 596 (requisition as to child's date of birth). Cf *Selkirk v Romar Investments Ltd* [1963] 3 All ER 994, [1963] 1 WLR 1415, PC, where it was held that rescission was legitimate after reasonable but unsuccessful attempts to find evidence of the date of a death.

4 *Re Great Northern Rly Co and Sanderson* (1884) 25 ChD 788 at 794; *Smith v Wallace* [1895] 1 Ch 385; *Re Jackson and Haden's Contract* [1906] 1 Ch 412, CA; *Baines v Tweddle* [1959] Ch 679, [1959] 2 All ER 724, CA; *Selkirk v Romar Investments Ltd* [1963] 3 All ER 994, [1963] 1 WLR 1415, PC. 'The purchaser is not bound to come in and say 'I will avoid on the terms of the condition and will only take what the condition gives me', but is entitled to say 'I will avoid the contract, condition and all, and will have what the law gives me apart from the condition': *Holliwell v Seacombe* [1906] 1 Ch 426 at 434 per Kekewich J (a sale under the direction of the court). As to the exercise of the right of rescission see *Mawson v Fletcher* (1870) 6 Ch App 91, where land was sold as containing minerals, but as the title to minerals under part of the land was doubtful the vendor was entitled to rescind; *Merrett v Schuster* [1920] 2 Ch 240, where an untrue statement of fact made by the vendor in good faith with substantial ground was not a bar to rescission, and where it was said that a statement that a third person will concur, made on his promise (but without a contract) to do so was not necessarily 'reckless'; *Re Milner and Organ's Contract* (1920) 89 LJ Ch 315, where, owing to a misinterpretation of a will, the vendor contracted to sell as trustee and the purchaser refused to accept his offer to sell as personal representative and the vendor was entitled to rescind; *Procter v Pugh* [1921] 2 Ch 256, where the vendor, acting reasonably, was unable to remove a difficulty as to restrictive covenants, and was entitled to rescind even though the purchaser had previously repudiated the contract (for criticism of this decision see T Cyprian Williams 'A Purchaser's Right of Repudiation' (1921) 66 Sol Jo 119, 135); *Re Des Reaux and Setchfield's Contract* [1926] Ch 178, where the vendor unreasonably refused to perfect the title where he knew of the defect and acted recklessly; *Baines v Tweddle* supra, where the vendor who did nothing to ascertain whether a mortgagee would concur was held to have acted recklessly and not to be entitled to rescind.

5 *St Leonard's, Shoreditch, Vestry v Hughes* (1864) 17 CBNS 137; *Ker v Crowe* (1873) IR 7 CL 181; *Bowman v Hyland* (1878) 8 ChD 588.

6 *Smith v Wallace* [1895] 1 Ch 385, where the court ordered the return of the deposit with interest. 'In fact, such a condition is only applicable to an honest case': *Re Deighton and Harris's Contract* [1898] 1 Ch 458 at 463, CA, per Lindley MR.

7 See *Bowman v Hyland* (1878) 8 ChD 588, distinguished in *Re Deighton and Harris's Contract* [1898] 1 Ch 458, CA.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

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### 107. Waiver of right of rescission.

If the condition allows rescission notwithstanding any intermediate negotiation or litigation with respect to the requisition, an attempt by the vendor to comply with the requisition is no waiver of the right to rescind<sup>1</sup>. However, in the absence of such words a vendor who attempts to answer the requisition may lose his right to rescind unless he answers without prejudice<sup>2</sup>, or unless the right to rescind only arises on insistence, for that implies the necessity for an answer<sup>3</sup>. Where the condition is so framed, the vendor can rescind at any time before final judgment<sup>4</sup>, but after judgment has been given against him he cannot do so<sup>5</sup>. Where, however, he rescinds pending litigation, and the purchaser's conduct has been reasonable, the court may order the vendor to pay the costs of the litigation until rescission, in addition to the costs of investigation of the title and the return of the deposit<sup>6</sup>. If the vendor himself seeks to enforce the contract without including an alternative claim for rescission<sup>7</sup>, he waives his right to rescind under the condition, but he may, perhaps, revert to it, on paying the costs, if he afterwards discontinues the proceedings<sup>8</sup>.

1 *Duddell v Simpson* (1866) 2 Ch App 102.

2 *Tanner v Smith* (1840) 10 Sim 410 (on appeal 4 Jur 310); *Morley v Cook* (1842) 2 Hare 106 at 115. An argumentative answer is no waiver of the right to rescind: *Morley v Cook* supra. In *Gardom v Lee* (1865) 3 H & C 651, the condition entitled the vendor either to answer or to rescind, and negotiation was not to affect the right to rescind; however, the vendor was not allowed to rescind because he had disputed, not negotiated. See also *M'Culloch v Gregory* (1855) 1 K & J 286.

3 See PARA 105 note 3 ante.

4 *Isaacs v Towell* [1898] 2 Ch 285 at 290. It appears that although the words 'notwithstanding litigation' are absent, the vendor may still rescind after action brought by the purchaser: *Isaacs v Towell* supra. See also *Hoy v Smythies* (1856) 22 Beav 510.

5 *Re Arbib and Class's Contract* [1891] 1 Ch 601, CA. The court will not read 'litigation' as 'judicial decision': *Re Arbib and Class's Contract* supra at 612. See also *Re Quigley and M'Clay's Contract* [1918] 1 IR 347.

6 *Re Higgins and Hitchman's Contract* (1882) 21 ChD 95 at 99; *Re Spindler and Mear's Contract* [1901] 1 Ch 908 (although the condition stipulated for the return of the deposit 'without any interest, costs of investigating the title, or other compensation or payment whatsoever'); and see *Duddell v Simpson* (1866) 2 Ch App 102 at 108; *Sheard v Venables* (1867) 36 LJ Ch 922 at 924.

7 See *Public Trustee v Pearlberg* [1940] 2 KB 1 at 19-20, [1940] 2 All ER 270 at 281, CA. Accordingly a notice to fix a new time for completion and, if default were made, to rescind, given by the vendor while an action by him for specific performance was continuing, was ineffective: *Public Trustee v Pearlberg* supra.

8 *Warde v Dickson* (1858) 5 Jur NS 698; *Gray v Fowler* (1873) LR 8 Exch 249. Cf *Motor Carriage Supply Co Ltd v British and Colonial Motor Co* (1901) 45 Sol Jo 672; and see *Isaacs v Towell* [1898] 2 Ch 285 at 292.

## UPDATE

### 1-136 The Contract and Preliminary Matters

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### **108. Rescission or compensation.**

Where the contract contains a condition for rescission, and also a condition for compensation in case of error in the description of the property, and the matter objected to falls within the latter condition, the purchaser cannot insist upon compensation if the vendor chooses to rescind under the former condition<sup>1</sup>.

<sup>1</sup> *Mawson v Fletcher* (1870) 6 Ch App 91; *Ashburner v Sewell* [1891] 3 Ch 405; *Vowles v Bristol etc Building Society* (1900) 44 Sol Jo 592. In *Re Terry and White's Contract* (1886) 32 ChD 14, CA, there was a condition excluding compensation, and the vendor was held entitled to rescind under a condition in that behalf against a purchaser seeking to enforce the contract with compensation; see also *Molphy v Coyne* (1919) 53 ILT 177. As to compensation generally see PARAS 111 et seq, 251 et seq post.

## **UPDATE**

### **1-136 The Contract and Preliminary Matters**

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## **H. IDENTITY AND DESCRIPTION**

### **109. Identity.**

It is commonly provided that the purchaser is to admit the identity of the property purchased by him with that comprised in the title deeds upon the evidence afforded by comparison of the descriptions in the particulars and in the title deeds, and that no further evidence of identity is to be required<sup>1</sup>. If the comparison affords no evidence that the property sold corresponds with that described in the abstracted documents<sup>2</sup>, or if the descriptions in the abstracted documents differ from one another and from those in the particulars<sup>3</sup>, even though the purchaser is precluded by this condition from calling for further evidence, yet, in the absence of satisfactory evidence of identity, the vendor's title is not established, and he cannot require the purchaser to complete<sup>4</sup>; and the vendor is not relieved by the condition from pointing out the entire property sold<sup>5</sup>.

<sup>1</sup> The Standard Conditions of Sale (3rd Edn) provide that the vendor need not: (1) prove the exact boundaries of the property; (2) prove who owns fences, ditches, hedges or walls; (3) separately identify parts of the property with different titles, further than he may be able to do from information in his possession: condition 4.3.1(a)-(c). The purchaser may, if it is reasonable, require the vendor to make or obtain, pay for and hand over a statutory declaration about facts relevant to these matters; the form of the declaration is to be agreed by the purchaser, who must not unreasonably withhold his agreement: see condition 4.3.2. As to the Standard



Conditions of Sale see PARA 1 note 9 ante. See also *Bird v Fox* (1853) 11 Hare 40 at 48. In the case of registered land, if the property is described as that comprised in the title, care must be taken to see that the land intended to be sold or purchased is precisely that included in the title.

2 *Curling v Austin* (1862) 2 Drew & Sm 129; *Re Bramwell's Contract, Bramwell v Ballards Securities Investments Ltd* [1969] 1 WLR 1659. As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 post.

3 *Flower v Hartopp* (1843) 6 Beav 476.

4 *Re Bramwell's Contract, Bramwell v Ballards Securities Investments Ltd* [1969] 1 WLR 1659.

5 *Robinson v Musgrove* (1838) 2 Mood & R 92. Difficulties of this nature usually arise where only part of the property included in the title deeds is sold.

## UPDATE

### 1-136 The Contract and Preliminary Matters

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#### 110. Misdescription.

The conditions usually provide for the case of error in the description of the property, and regulate the right to compensation<sup>1</sup>. Any restrictions on the right to compensation are intended to apply to the case of unintentional errors, and do not therefore apply to cases of actual fraud or of misrepresentation calculated materially to mislead the purchaser<sup>2</sup>. Where the error is immaterial the right to compensation may be restricted<sup>3</sup>.

1 As to the vendor's rights where the contract contains conditions both for rescission and for compensation see PARA 108 ante; and as to compensation under an open contract see PARA 250 et seq post.

The Standard Conditions of Sale (3rd Edn) provide that if any plan or statement in the contract, or in the negotiations leading to it, is or was misleading or inaccurate due to an error or omission, the remedies available are as follows (condition 7.1.1): (1) when there is a material difference between the description or value of the property as represented and as it is, the injured party is entitled to damages (condition 7.1.2); (2) an error or omission only entitles the injured party to rescind the contract: (a) where it results from fraud or recklessness; or (b) where he would be obliged, to his prejudice, to transfer or accept property differing substantially (in quantity, quality or tenure) from what the error or omission had led him to expect (condition 7.1.3(a)-(b)). As to the Standard Conditions of Sale see PARA 1 note 9 ante. For the meaning of 'contract' see PARA 55 note 10 ante.

2 *Stewart v Alliston* (1815) 1 Mer 26; *Viscount Clermont v Tasburgh* (1819) 1 Jac & W 112 at 120; *Price v Macaulay* (1852) 2 De GM & G 339; *Dimmock v Hallett* (1866) 2 Ch App 21 at 29, 31; *Re Terry and White's Contract* (1886) 32 ChD 14 at 20. See also *Duke of Norfolk v Worthy* (1808) 1 Camp 337; *Shepherd v Croft* [1911] 1 Ch 521 at 531. The court's jurisdiction is not exercised in favour of a vendor who fails to satisfy the court that he has done all he can to avoid misunderstanding and mistake: *Turquand v Rhodes* (1868) 37 LJ Ch 830. As to the vendor's liability for misrepresentation see PARA 51 et seq ante.

3 See the Standard Conditions of Sale (3rd Edn), condition 7.1; and note 1 supra.

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### 111. Compensation.

In one form of condition it is stipulated that any error or omission in the description of the property is not to annul the sale but, where material, is to be the subject of compensation on either side<sup>1</sup>. Under such a condition the vendor cannot insist on the purchaser taking, with compensation, a property substantially different from that which he agreed to buy<sup>2</sup>, but, if there is no substantial difference, the purchaser must complete the purchase and accept compensation for any deficiency even though that deficiency is considerable<sup>3</sup>.

On this principle the purchaser is entitled to be relieved from the contract, without resorting to the condition for compensation, if the legal character or incidents of the property sold differ materially from those set out in the particulars<sup>4</sup>, or if it is subject to rights of third persons which materially interfere with its enjoyment<sup>5</sup> or value<sup>6</sup>, or if a part of the property material to its enjoyment is missing<sup>7</sup> or where an error in quantity is so great as not to be a proper subject for compensation<sup>8</sup>. The condition does not apply to cases where it is impossible to assess the compensation<sup>9</sup>.

1 This result is achieved by different wording in the Standard Conditions of Sale (3rd Edn), condition 7.1: see PARA 110 note 1 ante. As to the Standard Conditions of Sale see PARA 1 note 9 ante. See also *Leslie v Tompson* (1851) 9 Hare 268 at 273; *Re Belcham and Gawley's Contract* [1930] 1 Ch 56. The Statutory Form of Conditions of Sale 1925, SR & O 1925/779 make no provision as to compensation. For another form of condition see PARA 115 post. Fiduciary vendors may make use of a condition in this form: see *Hobson v Bell* (1839) 2 Beav 17; *Dunn v Flood* (1885) 28 ChD 586 at 591, CA; *Re Chifferiel, Chifferiel v Watson* (1880) 40 ChD 45. It was formerly held that the court would not decree specific performance with compensation against trustee-vendors who had been grossly negligent, but would leave the purchaser to his remedy at law against the trustees: *White v Cuddon* (1842) 8 Cl & Fin 766 at 787, HL. However, having regard to the larger powers now conferred upon trustees to overreach equitable interests, it is possible that the preference would now be given to the purchaser, and that the beneficiary would have to look to the trustees to make good any loss to the trust estate due to their negligence.

2 This would be contrary to the principle of *Flight v Booth* (1834) 1 Bing NC 370, that where a misdescription is so substantial as in effect to alter the subject matter of the contract, there is no purchase of the thing that is really the subject of sale. See also *Jones v Edney* (1812) 3 Camp 285 (sale of a public house described as 'free,' but in fact tied); and PARA 51 ante, where the rule in *Flight v Booth* supra, is stated more fully. This principle is reflected in the Standard Conditions of Sale (3rd Edn), condition 7.1.3(b): see PARA 110 ante.

3 *Re Fawcett and Holmes' Contract* (1889) 42 ChD 150, CA; *Re Brewer and Hankins's Contract* (1899) 80 LT 127, CA; *Re Belcham and Gawley's Contract* [1930] 1 Ch 56. Cf *Shepherd v Croft* [1911] 1 Ch 521, where a condition excluding compensation was waived by the vendors; *Calcraft v Roebuck* (1790) 1 Ves 221; *Drewe v Hanson* (1802) 6 Ves 675 at 679; *Binks v Lord Rokeby* (1818) 2 Swan 222; *Price v Macaulay* (1852) 2 De GM & G 339; *McKenzie v Hesketh* (1877) 7 ChD 675; *English v Murray* (1883) 32 WR 84. As to the case where the property is greater or less than was supposed see note 8 infra.

4 Eg where land is sold as freehold, but, owing to its having formerly been copyhold, the minerals are reserved to the lord of the manor (*Kerr v Pawson* (1858) 25 Beav 394; *Upperton v Nickolson* (1871) 6 Ch App

436; and see *Bellamy v Debenham* [1891] 1 Ch 412, CA), or leaseholds, although held for a long term, are sold as freehold (*Drewe v Corp* (1804) 9 Ves 368), or the length of a term is greatly overstated (*Nash v Wooderson* (1884) 52 LT 49), or an underlease is sold as a lease (*Madeley v Booth* (1848) 2 De G & Sm 718; *Broom v Phillips* (1896) 74 LT 459; and see PARA 59 ante), or land is sold as building land when subject in fact to a right of way (*Dykes v Blake* (1838) 4 Bing NC 463), or there is a mistake as to identity (*Leach v Mullett* (1827) 3 C & P 115). As to the rule that a purchaser cannot be granted specific performance with an abatement of price on the ground of an innocent and non-negligent misrepresentation see PARA 42 ante.

5 Eg as undisclosed easements (*Shackleton v Sutcliffe* (1847) 1 De G & Sm 609), or undisclosed restrictive covenants (*Flight v Booth* (1834) 1 Bing NC 370; *Rudd v Lascelles* [1900] 1 Ch 815; and see *Cato v Thompson* (1882) 9 QBD 616 at 618, CA; *Pemsel and Wilson v Tucker* [1907] 2 Ch 191). The existence of a sewer under the garden attached to a house may, however, be a subject for compensation: *Re Brewer and Hankins's Contract* (1899) 80 LT 127, CA; *Re Belcham and Gawley's Contract* [1930] 1 Ch 56. The effect of such undisclosed matters will usually depend on the purposes for which the land is intended to be used by the purchaser or for which he is entitled to use it under restrictions affecting the property or planning regulations or for which he is likely to obtain planning permission: see *Shepherd v Croft* [1911] 1 Ch 521 at 528.

6 Eg where it was subject to a lease for lives at a low rent: *Hughes v Jones* (1861) 3 De GF & J 307. As to the conversion of leases for lives into leases for 90 years determinable by notice on the dropping of the last life see the Law of Property Act 1925 s 149(6); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 240. Where a lease intended to endure for a life is created after 1925, it will be created in the form of a lease for years determinable by notice on the death of the party named as the life.

7 See eg *Dobell v Hutchinson and Holdsworth* (1835) 3 Ad & El 355, where a yard described as part of the property sold was in fact held by the vendor at a yearly rent; *Brewer v Brown* (1884) 28 ChD 309, where a house and garden was described as enclosed by a rustic wall with a tradesmen's entrance, although the wall did not in fact belong to the property and the entrance was used on sufferance; *Stanton v Tattersall* (1835) 1 Sm & G 529, where the situation of a house was misdescribed through the particulars failing to indicate the peculiar nature of the access to it; *Peers v Lambert* (1844) 7 Beav 546, where the sale was to be of a wharf with a jetty, but the jetty was in fact removable at will by a third person.

8 *Earl of Durham v Legard* (1865) 34 Beav 611, where an estate, described as containing 21,750 acres, in fact contained only 11,814 acres, and the purchaser was not entitled to specific performance with a proportionate reduction of price. In this case there was no provision as to compensation, and the purchaser was allowed the option of paying the full price or rescinding. Similarly, where there is a large error to the prejudice of the vendor, the purchaser may be able to rescind instead of paying an increased price as compensation (*Price v North* (1837) 2 Y & C Ex 620); if not, he must give compensation under the condition (*Leslie v Tompson* (1851) 9 Hare 268). In *Orange v Wright* (1885) 54 LJ Ch 590, compensation was refused to the vendor. See also *Bourne v London and County Land and Building Co* [1885] WN 109. The condition is intended for the benefit of each party.

9 See *Sherwood v Robins* (1828) Mood & M 194 (contingency of not having children). The position was similar where, on the sale of a timber estate, particulars of the trees were not sufficiently given (*Lord Brooke v Rounthwaite* (1846) 5 Hare 298); and where the minerals were found to belong to third persons, and the value could not be ascertained (*Smithson v Powell, Powell v Smithson* (1852) 20 LTOS 105). See also *Ridgway v Gray* (1849) 1 Mac & G 109. A clerical error as to property comprised in an underlease (*Grissell v Peto* (1854) 2 Sm & G 39), or an error in the particulars as to occupation which is corrected by information given to the purchaser (*Farebrother v Gibson* (1857) 1 De G & J 602), is not an objection to the title; but in *Ridgway v Gray* supra, a misstatement as to the occupation under a lease was treated as incapable of assessment and the purchaser was entitled to rescind. The existence of undisclosed restrictive covenants has also been said to give rise to difficulties in assessing compensation: see *Cato v Thompson* (1882) 9 QBD 616 at 618, CA; and note 5 supra.

## UPDATE

### 1-136 The Contract and Preliminary Matters

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### **112. Vendor's interest different from that offered.**

Where the vendor has not got the interest which he has agreed to sell, the purchaser is in general entitled to take such interest as he has, subject to an abatement of the price, notwithstanding that he thus obtains an interest materially different from that which he agreed to buy<sup>1</sup>. Thus the court has assessed compensation in the case of a sale in fee by a vendor who was entitled in remainder and could not get in the life estate<sup>2</sup> or who had only an estate *pur autre vie*<sup>3</sup>, on a sale of leaseholds held for a term of years but misdescribed as carrying a right of renewal<sup>4</sup>, and on the grant of a lease for a term longer than that which the lessor had power to grant<sup>5</sup>.

1 This rule does not apply to a representation about the subject matter made, not in the contract, but collateral to it: *Rutherford v Acton-Adams* [1915] AC 866, PC; *Gilchester Properties Ltd v Gomm* [1948] 1 All ER 493. See also PARAS 42 ante, 251 post.

2 *Nelthorpe v Holgate* (1844) 1 Coll 203. See, however, *Thomas v Dering* (1837) 1 Keen 729 at 743.

3 *Barnes v Wood* (1869) LR 8 Eq 424. See also *Horner v Williams* (1839) Jo & Car 274.

4 *Painter v Newby* (1853) 11 Hare 26.

5 *Leslie v Crommelin* (1867) IR 2 Eq 134.

## **UPDATE**

### **1-136 The Contract and Preliminary Matters**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/H. IDENTITY AND DESCRIPTION/113. Recovery of compensation.

### **113. Recovery of compensation.**

Unless the condition for compensation is expressly limited to errors pointed out before completion, the purchaser can recover compensation for errors even after completion. In the absence of such express limitation the court does not import into the condition a distinction between errors discovered before, and errors discovered after, execution of the transfer<sup>1</sup>.

A purchaser is not necessarily debarred from claiming compensation under the condition because he knew of the error before he entered into the contract<sup>2</sup>.

1 *Cann v Cann* (1830) 3 Sim 447; *Bos v Helsham* (1866) LR 2 Exch 72; *Re Turner and Skelton* (1879) 13 ChD 130; *Phelps v White* (1881) 7 LR Ir 160, Ir CA; *Palmer v Johnson* (1884) 13 QBD 351, CA (distinguishing *Joliffe v*

*Baker* (1883) 11 QBD 255 on the ground that there was there no condition providing for compensation). Contrast *Manson v Thacker* (1878) 7 ChD 620. See also *Eastwood v Ashton* [1915] AC 900, HL. Where there is no condition allowing compensation the purchaser cannot claim compensation after conveyance: *Besley v Besley* (1878) 9 ChD 103; *Allen v Richardson* (1879) 13 ChD 524; *Brett v Clowser* (1880) 5 CPD 376; *Joliffe v Baker* supra at 267; *Clayton v Leech* (1889) 41 ChD 103, CA. See also PARA 250 post. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

2 *Lett v Randall* (1883) 49 LT 71; but see *Cobbett v Locke-King* (1900) 16 TLR 379. However, evidence is admissible to show that the purchaser heard the auctioneer correct the misdescription before the sale, in which event he will not be entitled to compensation under the condition: *Re Edwards to Daniel Sykes & Co Ltd* (1890) 62 LT 445; cf *Henderson v Hudson* (1867) 15 WR 860.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/H. IDENTITY AND DESCRIPTION/114. Defects of title.

#### 114. Defects of title.

Where the condition is framed to cover errors in the description of the property, it does not extend to defects in title, but only applies to misdescriptions of the corporeal property<sup>1</sup>. The same principle seems to apply where the condition provides for any error, misstatement or omission in the particulars<sup>2</sup>. The innocent omission by the vendor to disclose the service upon him of a notice by a local authority requiring him to execute certain works in respect of his property is not such an omission in the particulars as would entitle the purchaser to compensation under the usual condition where the expenses of the works do not become a charge on the property until after completion of the sale<sup>3</sup>.

It is a general rule with regard to defects in title that the vendor will not be compelled to give, nor the purchaser to take, an indemnity against the defect<sup>4</sup>.

1 *Re Beyfus and Master's Contract* (1888) 39 ChD 110, CA; *Debenham v Sawbridge* [1901] 2 Ch 98. A defect in title which the purchaser is precluded from objecting to is not a ground for compensation: *Re Neale and Drew's Contract* (1897) 41 Sol Jo 274.

2 'It is not the function of the particulars to deal with title': *Blaiberg v Keeves* [1906] 2 Ch 175 at 184; and see PARA 79 ante.

3 *Re Leyland and Taylor's Contract* [1900] 2 Ch 625, CA, where, at 632, it was left undecided whether the omission would enable the purchaser to resist specific performance or obtain rescission. As to a claim by an agricultural tenant to compensation, cf *Re Earl of Derby and Fergusson's Contract* [1912] 1 Ch 479. As to modern conditions relating to local authorities' charges see PARA 126 post.

4 *Balmanno v Lumley* (1813) 1 Ves & B 224; *Fildes v Hooker* (1818) 3 Madd 193; *Nouaille v Flight* (1844) 7 Beav 521; *Ridgway v Gray* (1849) 1 Mac & G 109. See, however, *Horniblow v Shirley* (1802) 13 Ves 81; *Halsey v Grant* (1806) 13 Ves 73; *Manning v Turner* [1956] 3 All ER 641, [1957] 1 WLR 91, where it was suggested that a contingent liability to estate duty (now inheritance tax) might be provided for by an indemnity policy. As to indemnity where conditions disclose an incumbrance see PARA 129 note 3 post.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/H. IDENTITY AND DESCRIPTION/115. Condition allowing no compensation for misdescription.

#### 115. Condition allowing no compensation for misdescription.

A second form<sup>1</sup> of condition relating to misdescription provides that any error, misstatement or omission is not to annul the sale, nor, unless the error, misstatement or omission is in a written answer and relates to a matter materially affecting the description or value of the property, are any damages to be payable or compensation allowed by either party in respect of it<sup>2</sup>. Such restrictions on the vendor's remedies do not apply where the error, misstatement or omission is fraudulent or reckless, nor to any matter or thing by which the purchaser is prevented from getting substantially what he contracted to buy<sup>3</sup>. Notwithstanding such a condition, the vendor cannot enforce specific performance of the contract, with or without abatement, if the misdescription or omission is material and substantial (that is, such that the purchaser cannot get what he agreed to buy<sup>4</sup>) and in such circumstances the purchaser is entitled to rescind and recover his deposit<sup>5</sup>. On the other hand, the purchaser cannot enforce the contract against the vendor with compensation, although he may, of course, take the property without compensation<sup>6</sup>.

The condition in the second form does not apply to latent defects in the property, but only to such matters as might be discovered by an inspection of the property with reasonable care<sup>7</sup>, and it does not apply to errors which are known to the vendor when the conditions are prepared<sup>8</sup>. It does not exclude recovery of damages on the covenant for title where a title is not given to part of the property<sup>9</sup>.

1 As to the effect of the first form see PARA 111 ante.

2 A condition in this form was included in the National Conditions of Sale (20th Edn), condition 17(1). This condition was redrafted in response to the criticisms expressed in *Walker v Boyle* [1982] 1 All ER 634, [1982] 1 WLR 495: see PARA 116 note 4 post. The errors and omissions are not confined to physical misdescriptions: *Re Courcier and Harold's Contract* [1923] 1 Ch 565 (error in statement of restrictive covenants); *Curtis v French* [1929] 1 Ch 253, where, on a sale with vacant possession, an error in the statement of the tenant's rights by which vacant possession could not be given was held to be an error or misstatement within a condition excluding compensation. As to the Standard Conditions of Sale see PARA 1 note 9 ante.

3 See the National Conditions of Sale (20th Edn), condition 17(2); and note 2 supra. See also the Standard Conditions of Sale (3rd Edn), condition 7.1; and PARA 110 ante.

4 *Jacobs v Revell* [1900] 2 Ch 858, where it was said, at 865, that a condition excluding compensation applies to all errors, whether great or small, but only within the limit laid down in *Flight v Booth* (1834) 1 Bing NC 370 at 377; and see PARA 51 ante. See also *Portman v Mill* (1826) 2 Russ 570; *Cordingley v Cheeseborough* (1862) 4 De GF & J 379 (deficiency in quantity of nearly one half); *Whittemore v Whittemore* (1869) LR 8 Eq 603 (large deficiency of acreage not covered by 'more or less'); *Re Arnold, Arnold v Arnold* (1880) 14 ChD 270, CA (sale of field as a four acre field, but in fact four undivided sevenths of a seven acre field). 'Notwithstanding

such a condition, the court will not decree specific performance at the instance of the vendor, if he has materially misled the purchaser, and it is well known that a less serious misleading is sufficient to enable a purchaser to resist specific performance than is required to enable him to rescind the contract': *Re Terry and White's Contract* (1886) 32 ChD 14 at 29, CA, per Lindley LJ. See also *Re Courcier and Harrold's Contract* [1923] 1 Ch 565; *Watson v Burton* [1956] 3 All ER 929, [1957] 1 WLR 19 (misdescription in contract; area stated as 3,920 in fact 2,360 sq yds).

5 *Heywood v Mallalieu* (1883) 25 ChD 357; *Nottingham Patent Brick and Tile Co v Butler* (1886) 16 QBD 778 at 786, CA; *Lee v Rayson* [1917] 1 Ch 613. As to the recovery of the deposit see PARAS 245-246 post.

6 *Cordingley v Cheeseborough* (1862) 4 De GF & J 379; *Re Terry and White's Contract* (1886) 32 ChD 14, CA. See also *Nicoll v Chambers* (1852) 11 CB 996; *Molphy v Coyne* (1919) 53 ILT 177.

7 *Re Puckett and Smith's Contract* [1902] 2 Ch 258, CA (underground culvert).

8 *Simpson v Gilley* (1922) 92 LJ Ch 194. See also *Re Tower's Contract* [1924] WN 331. Both forms of condition are now drafted so as to relate also to precontractual misrepresentations: cf *Bellotti v Chequers Developments Ltd* [1936] 1 All ER 89; and PARA 116 post.

9 *Eastwood v Ashton* [1915] AC 900, HL.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/H. IDENTITY AND DESCRIPTION/116. Statutory regulation of condition excluding or restricting liability for misrepresentation.

### 116. Statutory regulation of condition excluding or restricting liability for misrepresentation.

The two forms of condition<sup>1</sup> relating to compensation are designed to apply to both precontractual misrepresentations and contractual misdescriptions. In so far as they purport to restrict the purchaser's remedies for misrepresentation<sup>2</sup> they cannot be relied on by the vendor unless he proves in a particular case that the condition satisfies a statutory test of reasonableness<sup>3</sup>, that is that the condition is a fair and reasonable one to be included in the contract having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made<sup>4</sup>. Moreover, such a condition is inapplicable where the vendor has, even innocently, made a misrepresentation when the true facts are within his own knowledge<sup>5</sup>.

<sup>1</sup> ie those discussed in PARAS 111, 115 ante.

<sup>2</sup> See also MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 803.

<sup>3</sup> See the Misrepresentation Act 1967 s 3 (as substituted); and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 803, 828.

<sup>4</sup> See the Unfair Contract Terms Act 1977 s 11(1). There is no similar regulation of conditions restricting liability for breach of contract, since the more general provisions of the Unfair Contract Terms Act 1977 do not

apply to contracts for the creation, transfer or termination of an interest in land: s 1(2), Sch 1 para 1(b). It is arguable, however, that land contracts fall within the Unfair Terms in Consumer Contracts Regulations 1994, SI 1994/3159 (see CONTRACT vol 9(1) (Reissue) PARAS 790-796): see Bright and Bright 'Unfair Terms in Land Contracts: Copy Out or Cop Out?' (1995) 111 LQR 655; and PARA 78 note 2 ante. The conditions referred to above may be considered as severable, so that the restrictions are wholly effective in relation to the breach of contract and subject to the test of reasonableness in relation to misrepresentation: see *Cremdean Properties v Nash* (1977) 241 Estates Gazette 837. See also *Walker v Boyle* [1982] 1 All ER 634, [1982] 1 WLR 495, where the vendor in his replies to precontractual inquiries had innocently misrepresented that he was unaware of any boundary dispute, and it was held that the National Conditions of Sale (19th Edn), condition 17, was invalid (see now the National Conditions of Sale (20th Edn), condition 17; the Standard Conditions of Sale (3rd Edn), condition 7; and PARA 115 ante). The reasonableness test is not applicable to a provision by which an agent's authority to make representations is excluded or restricted: *Overbrooke Estates Ltd v Glencombe Properties Ltd* [1974] 3 All ER 511, [1974] 1 WLR 1335; *Collins v Howell-Jones* [1981] 2 EGLR 108, 259 Estates Gazette 331, CA. As to remedies for errors and omissions in the Standard Conditions of Sale (3rd Edn) see condition 7; and PARA 110 ante. As to the Standard Conditions of Sale see PARA 1 note 9 ante.

5 *Walker v Boyle* [1982] 1 All ER 634, [1982] 1 WLR 495, applying by analogy the principles relating to misleading conditions: see PARA 83 ante.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### 116 Statutory regulation of condition excluding or restricting liability for misrepresentation

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

NOTE 4--SI 1994/3159 now Unfair Terms in Consumer Contracts Regulations 1999, SI 1999/2083.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/l. INSURANCE/117. Common law position as to insurance.

## I. INSURANCE

### 117. Common law position as to insurance.

A vendor retains an insurable interest in land until transfer<sup>1</sup>, and the position at common law, in default of express provision in the contract of sale, was that he was entitled against the purchaser to retain payments made after the date of the contract under a fire insurance policy which he had effected, even though the property was at the purchaser's risk pending completion<sup>2</sup>. Moreover, the vendor was not bound to keep the policy in force pending completion or to inform the purchaser of its lapse<sup>3</sup>.

1 See INSURANCE vol 25 (2003 Reissue) PARA 608. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.



2 See *Rayner v Preston* (1881) 18 ChD 1, CA; and INSURANCE vol 25 (2003 Reissue) PARA 608. In *Rayner v Preston* supra, at 15, James LJ expressed the opinion that, where the insurance money had not yet been paid over to the vendor, the purchaser could compel the insurance company to expend it on reinstating the property by virtue of the provisions of the Fires Prevention (Metropolis) Act 1774 s 83 (see INSURANCE vol 25 (2003 Reissue) PARAS 637-639).

3 *Paine v Meller* (1801) 6 Ves 349; *Dowson v Solomon* (1859) 1 Drew & Sm 1 at 12. See also INSURANCE vol 25 (2003 Reissue) PARA 625.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/l. INSURANCE/118. Effect of statute and conditions of sale.

#### 118. Effect of statute and conditions of sale.

By statute any payment made after the contract under an insurance policy maintained by the vendor in respect of damage to, or the destruction of, the property sold must on completion be paid to the purchaser; but this is subject to any stipulation to the contrary in the contract, any requisite consent of the insurers, and the payment by the purchaser of the proportionate part of the premium from the date of the contract<sup>1</sup>. The matter is now usually provided for in the conditions of sale.

The Standard Conditions of Sale<sup>2</sup> reverse the common law position as to risk and exclude the statutory provision outlined above<sup>3</sup>. The vendor must transfer<sup>4</sup> the property in the same physical state as it was at the date of the contract<sup>5</sup> (except for fair wear and tear), which means that the vendor retains the risk until completion<sup>6</sup>. If at any time before completion the physical state of the property makes it unusable for its purpose at the date of the contract (1) the purchaser may rescind the contract<sup>7</sup>; (2) the vendor may rescind the contract where the property has become unusable for that purpose as a result of damage against which the vendor could not reasonably have insured, or which it is not legally possible for the vendor to make good<sup>8</sup>. The vendor is under no obligation to the purchaser to insure the property<sup>9</sup>.

Where the vendor is unwilling to bear the risk in this way, consideration should be given to using conditions which were formerly in general use. These conditions may provide that the vendor is not liable to the purchaser to keep the insurance on foot or to notify the purchaser that a premium is due<sup>10</sup>, although he may be required to obtain an indorsement on the policy of the purchaser's interest<sup>11</sup>. Despite this condition, a purchaser should generally effect his own insurance on executing the contract<sup>12</sup>, and, where he is mortgaging the property to secure part of the purchase money, he will probably have to effect the insurance with such office as the mortgagee requires<sup>13</sup>.

If both the vendor and the purchaser have effected insurance, the conditions may provide that if the property is damaged before completion and the proceeds of the purchaser's policy are reduced by reason of the existence of the vendor's policy, the purchase price is to be abated by the amount of the reduction<sup>14</sup>.

- 1 Law of Property Act 1925 s 47(1), (2). Section 47, also applies, subject to necessary modifications, to sales by the court: s 47(3).
- 2 See the Standard Conditions of Sale (3rd Edn); and PARA 1 note 9 ante.
- 3 See the Standard Conditions of Sale (3rd Edn), condition 5.1.4.
- 4 'Transfer' includes conveyance and assignment: Standard Conditions of Sale (3rd Edn), condition 1.1.1(m). As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.
- 5 For the meaning of 'contract' see PARA 55 note 10 ante.
- 6 Standard Conditions of Sale (3rd Edn), condition 5.1.1.
- 7 Standard Conditions of Sale (3rd Edn), condition 5.1.2(a).
- 8 Standard Conditions of Sale (3rd Edn), condition 5.1.2(b).
- 9 Standard Conditions of Sale (3rd Edn), condition 5.1.3. There may well be circumstances where the purchaser wishes the vendor to maintain the insurance policy, and such an obligation can be created by a special condition, which may give the purchaser the right to inspect the policy and to have his interest noted on the policy, and may also, where appropriate, oblige the purchaser to pay a proportionate part of the premium. For an alternative form of condition containing the latter obligation see Precedents for the Conveyancer, p 8217, clause 16-62. It is suggested that consideration be given to inserting a time limit for rescission. Where the property is in the course of construction, careful thought must be given to the contractual provisions. A special condition requiring the vendor to complete the building works in accordance with agreed plans will override Standard Conditions of Sale (3rd Edn), condition 5.1.1 (see the text to note 7 supra), and it might then be appropriate for the purchaser to bear the risk until completion, in which case the purchaser is to insure and the vendor need not.
- 10 See The Law Society's General Conditions of Sale (1984 Revision), condition 11(4) (unless the property is leasehold and the vendor has an obligation to insure); and the National Conditions of Sale (20th Edn), condition 21(1). The purchaser may be allowed to inspect the policy: see the National Conditions of Sale (20th Edn), condition 21(2).
- 11 See the National Conditions of Sale (20th Edn), condition 21(3). In such a case the vendor may require the purchaser to pay on completion a proportionate part of the premium from the date of the contract.
- 12 This is usually necessary owing to delay in obtaining the insurers' consent to any indorsement or transfer of the benefit to the purchaser.
- 13 Building societies usually require the insurance to be with a company of their choice and often require the premiums to be paid to them. Insurance companies financing house purchase usually require the insurance to be with the company. In the case of an owner-occupier the premises are often insured together with the furniture on the premises and many other risks in a comprehensive policy. This policy may be determined if the owner-occupier vacates the premises before completion. Inquiry should therefore be made before contract as to the position as regards insurance, and it may sometimes be necessary for the purchaser to obtain cover before completion of the contract, or the issue of a new policy. As to inquiries before contract generally see PARA 4 et seq ante.
- 14 See The Law Society's General Conditions of Sale (1984 Revision), condition 11(1), which does not apply where the proceeds of the vendor's policy are applied towards the reinstatement of property in pursuance of any statutory or contractual obligation: The Law Society's General Conditions of Sale (1980 Edn), condition 11(2). It is therefore desirable that the purchaser should effect his own insurance.

## **UPDATE**

### **1-136 The Contract and Preliminary Matters**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/J. COMPLETION/119. Occupation before completion.

## **J. COMPLETION**

### **119. Occupation before completion.**

The Standard Conditions of Sale provide for the situation where the vendor allows the purchaser into occupation before completion<sup>1</sup>. The general effect of these conditions is that the purchaser is to be a licensee and not a tenant of the vendor<sup>2</sup>. The terms of the licence are that the purchaser: (1) cannot transfer the licence<sup>3</sup>; (2) may permit members of his household to occupy the property<sup>4</sup>; (3) is to pay or indemnify the vendor against all outgoings<sup>5</sup> and other expenses in respect of the property<sup>6</sup>; (4) is to pay the vendor a fee calculated at the contract rate<sup>7</sup> on the purchase price (less any deposit paid) for the period of the licence<sup>8</sup>; (5) is entitled to any rents and profits from any part of the property which he does not occupy<sup>9</sup>; (6) is to keep the property in as good a state of repair as it was in when he went into occupation (except for fair wear and tear) and is not to alter it<sup>10</sup>; (7) is to insure the property in a sum which is not less than the purchase price against all risks in respect of which comparable premises are normally insured<sup>11</sup>; and (8) is to quit the property when the licence ends<sup>12</sup>, which is on the earliest of completion date<sup>13</sup>, rescission of the contract<sup>14</sup>, or when five working days<sup>15</sup> notice given by one party to the other takes effect<sup>16</sup>. If the purchaser is in occupation of the property after his licence has come to an end and the contract is subsequently completed, he must pay the vendor compensation for his continued occupation calculated at the same rate as the fee mentioned in head (4) above<sup>17</sup>. The purchaser is not in occupation for the purposes of this condition if he merely exercises rights of access given solely to do work agreed by the vendor<sup>18</sup>. The purchaser's right to raise requisitions<sup>19</sup> is unaffected by the fact that he is in occupation<sup>20</sup>. Where the vendor unlawfully allows the purchaser into possession, for example contrary to a covenant in the lease, the entry into possession does not make the purchaser liable for interest on the purchase money<sup>21</sup>.

1 See the Standard Conditions of Sale (3rd Edn), condition 5.2.1. As to the Standard Conditions of Sale see PARA 1 note 9 ante. As to power of entry before completion in the case of purchase under compulsory powers see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 638 et seq.

2 See the Standard Conditions of Sale (3rd Edn), condition 5.2.2. On the creation of the purchaser's licence, condition 5.1 (see PARA 118 ante) ceases to apply, which means that the purchaser then assumes the risk until completion: condition 5.2.3.

These provisions are important, since otherwise there would be a danger that the purchaser would acquire a protected tenancy: see *Francis Jackson Developments Ltd v Stemp* [1943] 2 All ER 601, CA; *Chamberlain v Farr* [1942] 2 All ER 567, 112 LJKB 206, CA; *Bretherton v Paton* [1986] 1 EGLR 172, 18 HLR 257, CA. The efficacy of such a contractual provision must be doubtful after *Street v Mountford* [1985] AC 809, [1985] 2 All ER 289, HL (though see Lord Templeman at 819, 821, and 294, 296); cf *Dunthorne and Shore v Wiggins* [1943] 2 All ER 678, CA; and see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 200. Where the agreement is for the grant of a lease at a rent, and the intending lessee is allowed into possession before completion and starts to pay rent, the situation is inconsistent with a provision in the conditions that he is to be only a licensee: *Joel v Montgomery and Taylor Ltd* [1967] Ch 272, [1966] 3 All ER 763. In *Hyde v Pearce* [1982] 1 All ER 1029, [1982] 1 WLR 560, CA, where a purchaser had gone into possession before completion but his licence to occupy had been terminated in 1958, it was held that he had not acquired a possessory title by 1972 because he had not made it clear that he was no longer bound by the contract (but see Dockray 'What is Adverse Possession: Hyde and Seek' (1983) 46 MLR 89; and cf *Bridges v Mees* [1957] Ch 475, [1957] 2 All ER 577, not cited).

3 Standard Conditions of Sale (3rd Edn), condition 5.2.2(a). As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

4 Standard Conditions of Sale (3rd Edn), condition 5.2.2(b).

5 The purchaser cannot recover his expenditure on improvements, even where the sale goes off owing to the vendor's default: see *Worthington v Warrington* (1849) 8 CB 134; *Lloyd v Stanbury* [1971] 2 All ER 267, [1971] 1 WLR 535; *Lee-Parker v Izzet* [1971] 3 All ER 1099, [1971] 1 WLR 1688. Where the purchaser is in default, it seems that the vendor can recover an amount necessary to restore the property to a habitable condition: cf *Crisp v Fox* (1967) 201 Estates Gazette 769. Where the vendor seeks specific performance, the purchaser is usually given the option either to relinquish occupation or to pay into court the balance of the purchase money with interest: *Greenwood v Turner* [1891] 2 Ch 144; *Attfield v DJ Plant Hire & General Contractors Co Ltd* [1987] Ch 141, [1986] 3 All ER 273. This option may be granted even where he has extensively altered the property but probably not where he has caused great and lasting damage: see *Maskell v Ivory* [1970] Ch 502, [1970] 1 All ER 488. In working out these remedies, account must be taken of the fact that, under the present form of the Standard Conditions of Sale (3rd Edn), condition 5.2 it is a specific term of the purchaser's licence that he is not to alter the property: see condition 5.2.2(f); and the text to note 10 infra.

6 Standard Conditions of Sale (3rd Edn), condition 5.2.2(c).

7 'Contract rate', unless defined in the agreement, is The Law Society's interest rate from time to time in force: Standard Conditions of Sale (3rd Edn), condition 1.1.1(g). This rate is published at regular intervals in The Law Society's Gazette.

8 Standard Conditions of Sale (3rd Edn), condition 5.2.2(d).

9 Standard Conditions of Sale (3rd Edn), condition 5.2.2(e).

10 Standard Conditions of Sale (3rd Edn), condition 5.2.2(f).

11 Standard Conditions of Sale (3rd Edn), condition 5.2.2(g).

12 Standard Conditions of Sale (3rd Edn), condition 5.2.2(h).

13 For the meaning of 'completion date' see PARA 102 note 5 ante.

14 For the meaning of 'contract' see PARA 55 note 10 ante.

15 For the meaning of 'working day' see PARA 101 note 3 ante.

16 Standard Conditions of Sale (3rd Edn), condition 5.2.5.

17 Standard Conditions of Sale (3rd Edn), condition 5.2.6.

18 Standard Conditions of Sale (3rd Edn), condition 5.2.4.

19 For the meaning of 'requisition' see PARA 101 note 2 ante.

20 Standard Conditions of Sale (3rd Edn), condition 5.2.7.

21 *Cantor Art Services Ltd v Kenneth Bieber Photography Ltd* [1969] 3 All ER 843, [1969] 1 WLR 1226, CA.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/J. COMPLETION/120. Contractual date for completion.

## 120. Contractual date for completion.

A date is usually fixed by the conditions of sale for the completion of the purchase<sup>1</sup>, but, in the absence of express stipulation to that effect, or unless an intention that it should be so can be implied from the circumstances, that date is not of the essence of the contract<sup>2</sup>. However, although time is not originally of the essence of the contract in this respect, it may be made so by either party giving proper notice to the other to complete within a reasonable time<sup>3</sup>, and such a notice may be served immediately after the contractual date for completion has passed<sup>4</sup>. Even where time is not originally of the essence, a party who through his own default fails to complete on the contractual date commits a breach of the contract and is liable in damages<sup>5</sup>. In a suitable case, a decree of specific performance can also be obtained before the contractual date for completion if the other party repudiates the contract<sup>6</sup>.

Where time is or has been made of the essence, any extension of the time for completion to a new date makes that new date of the essence<sup>7</sup>; so too if the extension to a new date is granted to a third person who wishes to take over the contract<sup>8</sup>. Time will cease to be of the essence only if the party granting the extension leads the other party to think that he will be given time indefinitely and will not be cut off without further notice<sup>9</sup>. Merely standing by and failing to insist on punctual performance, at all events unless it continues for an unreasonably long time, does not amount to waiver<sup>10</sup>.

1 For the meaning of 'completion date' in the Standard Conditions of Sale (3rd Edn) see PARA 102 note 5 ante. As to the Standard Conditions of Sale see PARA 1 note 9 ante. See also the Statutory Form of Conditions of Sale 1925, SR & O 1925/779, condition 1 (unless otherwise agreed, the first working day after the expiration of seven weeks from the date of the contract). The '28th day of December next' in a contract made on 15 December referred to that December: *Dawes v Charsley* (1866) 2 TLR 530, CA. The date cannot be waived and another day substituted orally: *Stowell v Robinson* (1837) 3 Bing NC 928. Even though no time is fixed the contract is none the less enforceable (*Gray v Smith* (1889) 43 ChD 208 at 214; affd (1889) 43 ChD 208, CA), and the vendor must make out his title within a reasonable time (*Simpson v Hughes* (1897) 66 LJ Ch 334, CA; see also *Green v Sevin* (1879) 13 ChD 589 at 599). On a sale of land used for sheep farming a term that a completion date would be agreed did not render the contract void for uncertainty as it could be implied that completion would take place at the end of a reasonable period after the lambing season: *Walters v Roberts* (1980) 41 P & CR 210. As to delay in completion after the conveyance has been executed and delivered in escrow see *Kingston v Ambrian Investment Co Ltd* [1975] 1 All ER 120, [1975] 1 WLR 161, CA; *Glessing v Green* [1975] 2 All ER 696, [1975] 1 WLR 863, CA. As to completion generally see PARA 262 et seq post.

2 See the Standard Conditions of Sale (3rd Edn) which provide that time is not of the essence of the contract unless a notice to complete has been served (condition 6.1.1); and the Law of Property Act 1925 s 41, applying the rules of equity to the common law. For the meaning of 'contract' see PARA 55 note 10 ante. See also *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, [1977] 2 All ER 62, HL; *Raineri v Miles (Wiejski, third party)* [1981] AC 1050, [1980] 2 All ER 145, HL. In the particular circumstances of the contract the time for completion may be of the essence: *Levy v Lindo* (1817) 3 Mer 81 at 84; *Coslake v Till* (1826) 1 Russ 376 (sale of public house); *Tilley v Thomas* (1867) 3 Ch App 61 (sale of house intended for immediate occupation); *Tadcaster Tower Brewery Co v Wilson* [1897] 1 Ch 705 (sale of public house); *Bernard v Williams* (1928) 139 LT 22, DC; *Lock v Bell* [1931] 1 Ch 35 (sale of licensed premises); *Harold Wood Brick Co Ltd v Ferris* [1935] 2 KB 198, CA; *Pips (Leisure Productions) Ltd v Walton* (1982) 43 P & CR 415 (sale of lease with 15-and-a-half years to run). Cf *Williams v Greatrex* [1956] 3 All ER 705, [1957] 1 WLR 31, CA, where, in special circumstances, a ten year delay was no bar to specific performance; *Lazard Bros & Co Ltd v Fairfield Properties Co (Mayfair) Ltd* (1977) 121 Sol Jo 793, where a three year delay was no bar to specific performance; *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch 1, [1991] 2 All ER 477, CA. The express terms of the contract may prevent time being of the essence where otherwise it would have been: see *Ellis v Lawrence* (1969) 210 Estates Gazette 215; *F and B Entertainment Ltd v Leisure Enterprises Ltd* (1976) 240 Estates Gazette 455, (1976) EGLR 79; *British and Commonwealth Holdings plc v Quadrex Holdings Inc* [1989] QB 842, [1989] 3 All ER 492, CA. The date fixed for completion is no less a part of the contract than any other clause, but equity will grant relief where an unfair use is made of its literal terms: *Stickney v Keeble* [1915] AC 386, HL; and see *Jamshed Khodaram Irani v Burjorji Dhunjibhai* (1915) 32 TLR 156, PC. See also PARAS 100, 102 ante, 185 post; and CONTRACT vol 9(1) (Reissue) PARAS 931-932; EQUITY vol 16(2) (Reissue) PARA 808; SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 899 et seq. As to waiver of a condition that time is to be of the essence see *Dyas v Rooney* (1890) 25 LR Ir 342; and CONTRACT vol 9(1) (Reissue) PARA 936.

3 *King v Wilson* (1843) 6 Beav 124 at 126; *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904 at 946, [1977] 2 All ER 62 at 85, HL. As to what is a reasonable time see *Wells v Maxwell* (1863) 33 LJ Ch 44. Reasonableness must be judged as at the date when notice is given: *Crawford v Toogood* (1879) 13 ChD 153; and see *Smith v Batsford* (1897) 76 LT 179, where notice was held to be reasonable, even though after the time for completion. In considering reasonableness the vendor's previous delay and the purchaser's attitude to it must be considered: *Stickney v Keeble* [1915] AC 386 at 418-419, HL. A vendor who has put it out of his own power to complete, or who has by his conduct lost the right to specific performance, has no equity to restrain proceedings at law based on non-observation of the stipulation as to time: *Stickney v Keeble* supra, at 416. Even where a condition provides for giving notice to complete within 28 days, that period may not be reasonable: see *Re Barr's Contract, Moorwell Holdings Ltd v Barr* [1956] Ch 551, [1956] 2 All ER 853. However, the standard conditions of sale now in general use provide for the service of a notice to complete of prescribed length, in respect of which time is of the essence: see PARA 121 post.

4 See *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch 1, [1991] 2 All ER 477, CA (reviewing previous authorities and overruling *Smith v Hamilton* [1951] Ch 174, [1950] 2 All ER 928). The party serving the notice must not himself be responsible for the delay: *Schindler v Pigault* (1975) 30 P & CR 328, where the vendor, who failed to give access to a sub-purchaser of whom he knew, was unable to rely on a notice to complete. See also *Re Stone and Saville's Contract* [1963] 1 All ER 353, [1963] 1 WLR 163, CA, where a notice to complete was served by a vendor who could not show a good title, and the purchaser was entitled to rescind without first serving notice.

5 *Raineri v Miles (Wiejski, third party)* [1981] AC 1050, [1980] 2 All ER 145, HL, approving *Phillips v Lamdin* [1949] 2 KB 33, [1949] 1 All ER 770. The claim may be by the vendor or the purchaser and in either case the damages may be substantial. In relation to contracts made after 27 September 1989 (ie the date of commencement of the Law of Property (Miscellaneous Provisions) Act 1989 s 3: see s 5(3), (4)), in the case of a purchaser's claim, the vendor can no longer limit his damages under the rule in *Bain v Fothergill* (1874) LR 7 HL 158: see the Law of Property (Miscellaneous Provisions) Act 1989 s 3; para 256 post; and DAMAGES vol 12(1) (Reissue) PARA 1059.

6 *Hasham v Zenab* [1960] AC 316, [1960] 2 WLR 374, PC. See also *Marks v Lilley* [1959] 2 All ER 647, [1959] 1 WLR 749, where the purchaser did not make time of the essence, but 33 days after the contractual date for completion he issued a writ claiming specific performance; ten days later the vendor completed but the purchaser was entitled to the taxed costs of his action.

7 *Howe v Smith* (1884) 27 ChD 89, CA; *Lock v Bell* [1931] 1 Ch 35. However, see *Chancery Lane Developments Ltd v Wades Departmental Stores Ltd* (1986) 53 P & CR 306, CA, (The Law Society's Conditions of Sale (1984 Revision), condition 23(7) held to provide, by necessary implication, that time not of essence for purpose of extended date for completion).

8 *Buckland v Farmer and Moody (a firm)* [1978] 3 All ER 929, [1979] 1 WLR 221, CA.

9 *Luck v White* (1973) 26 P & CR 89; *Buckland v Farmer and Moody (a firm)* [1978] 3 All ER 929, [1979] 1 WLR 221, CA.

10 *Buckland v Farmer and Moody (a firm)* [1978] 3 All ER 929 at 942, [1979] 1 WLR 221 at 236, CA, per Goff LJ.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/J. COMPLETION/121. Notice to complete.

### 121. Notice to complete.

The Standard Conditions of Sale<sup>1</sup> contain a condition by which, if completion has not taken place by the contractual date for completion, either party may serve on the other a notice to complete<sup>2</sup> within a period of ten working days<sup>3</sup> from the giving of the notice, excluding the day on which the notice is given, and that period of time will then be of the essence of the contract<sup>4</sup>. Such a condition makes time automatically of the essence of the notice, whether or not the period prescribed is itself reasonable<sup>5</sup>. The notice need not refer expressly to the condition under which it is served, but it must be clear as a matter of construction that the notice is served under the relevant condition<sup>6</sup>.

The person serving the notice must himself not only be ready, able and willing to complete at the date when the notice is served, but must remain so throughout the period of the notice<sup>7</sup>. The notice binds the person serving it as well as the other party<sup>8</sup>, and if the person serving it is no longer ready and willing to complete at the date of expiration, the other party may then repudiate the contract<sup>9</sup>. However, time is not of the essence within the period of the notice, and therefore, if the recipient of the notice nominates a day for completion within the period, but in fact is not ready for completion on that date, that party is not in fundamental breach; but the same applies to the server of the notice if that party is not ready to complete on the nominate day<sup>10</sup>. A person cannot serve a notice when he is himself responsible for the delay<sup>11</sup>.

Where a conditional contract fixes a date for completion, a notice to complete can be served even though a condition has not yet been fulfilled<sup>12</sup>. When a notice to complete has expired, the party not in default may elect either to affirm or rescind the contract. On affirmation, damages will be available to compensate for loss caused by the delay, and may be claimed even after completion<sup>13</sup>. On rescission by the vendor, he may forfeit the deposit<sup>14</sup> and resell the property<sup>15</sup>, claiming as damages his expenses on the resale, together with any deficiency in the resale price as compared with the contract price<sup>16</sup>. He may also apply for vacation of the purchaser's registration of an estate contract<sup>17</sup>. On rescission by the purchaser, he may reclaim his deposit and accrued interest<sup>18</sup> and claim damages for any consequential loss<sup>19</sup>. The rights and remedies available under such conditions of sale are additional to those provided by the general law<sup>20</sup>. Such conditions do not apply after the award of a full decree of specific performance, unless the court so orders in working out the decree<sup>21</sup>.

1 See the Standard Conditions of Sale (3rd Edn), condition 6.8; and the text and notes 2-4, 7 *infra*. As to the Standard Conditions of Sale see PARA 1 note 9 *ante*. Where there are joint vendors the notice must be served by all of them: *Woods v Mackenzie Hill Ltd* [1975] 2 All ER 170, [1975] 1 WLR 613. Presumably where there are joint purchasers it must be served on all of them.

2 For the meaning of 'notice to complete' see PARA 102 note 5 *ante*.

3 This is applied strictly so that an insufficient notice period invalidates the notice itself: *Country and Metropolitan Homes Surrey Ltd v Topclaim Ltd* [1996] Ch 307, [1997] 1 All ER 254. For the meaning of 'working day' see PARA 101 note 3 *ante*.

4 See the Standard Conditions of Sale (3rd Edn), conditions 6.8.1, 6.8.3. For the meaning of 'contract' see PARA 55 note 10 *ante*. See also *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch 1, [1991] 2 All ER 477, CA.

5 *Innisfail Laundry Ltd v Dawe* (1963) 107 Sol Jo 437; *Cumberland Court (Brighton) Ltd v Taylor* [1964] Ch 29, [1963] 2 All ER 536.

6 *Babacomp Ltd v Rightside Properties Ltd* [1974] 1 All ER 142, CA, where notice to complete the contract 'according to its terms' was sufficient. It has been said that, if a person purports to serve a notice under a particular contractual condition, and that notice is invalid, it is not open to him to claim that the notice may take effect under the general law: *Rightside Properties Ltd v Gray* [1975] Ch 72, [1974] 2 All ER 1169; and see *Delta Vale Properties Ltd v Mills* [1990] 2 All ER 176 at 181, [1990] 1 WLR 445 at 452, CA, per Slade LJ; *Country and Metropolitan Homes Surrey Ltd v Topclaim Ltd* [1996] Ch 307, [1997] 1 All ER 254; but cf *Woods v Mackenzie Hill Ltd* [1975] 2 All ER 170, [1975] 1 WLR 613; *Dimsdale Developments (South East) Ltd v De Haan* (1983) 47 P & CR 1 (criticised in Thompson 'Case Notes. Notices to Complete and Associated Remedies' [1984] Conv 311). See also note 20 *infra*.

7 See the Standard Conditions of Sale (3rd Edn), condition 6.8.1, which makes such provision, but this requirement would be implied in any event: see *Finkelkraut v Monohan* [1949] 2 All ER 234; *Re Stone and*

*Saville's Contract* [1963] 1 All ER 353, [1963] 1 WLR 163, CA; *Horton v Kurzke* [1971] 2 All ER 577, [1971] 1 WLR 769; *Pagebar Properties Ltd v Derby Investment Holdings Ltd* [1973] 1 All ER 65, [1972] 1 WLR 1500; *Quadrangle Development and Construction Co Ltd v Jenner* [1974] 1 All ER 729, [1974] 1 WLR 68, CA; *Cole v Rose* [1978] 3 All ER 1121. The requirement is that the person serving the notice must, within his own knowledge, be ready to complete (*Cole v Rose* supra), but an exception is made for purely administrative matters, such as the preparation of a completion statement (which is, in any event, not a legal requirement: see *Carne v Debono* [1988] 3 All ER 485, [1988] 1 WLR 1107, CA), or arranging the time and place of completion, and arranging for the discharge of mortgages (*Cole v Rose* supra at 1128; *Edwards v Marshall-Lee* (1975) 235 Estates Gazette 901, CA). A vendor may be ready to complete even if he is in breach of his duty of trusteeship, which sounds only in damages: *Prosper Homes Ltd v Hambros Bank Executor and Trustee Co Ltd* (1979) 39 P & CR 395.

For cases on the validity of the notice to complete see *McGrath v Shah* (1987) 57 P & CR 452 (purchaser claimed misrepresentation by vendor), applied in *Bechal v Kitsford Holdings Ltd* [1988] 3 All ER 985, [1989] 1 WLR 105 (purchaser claimed material misdescription of property in conditions of sale). See also *Delta Vale Properties Ltd v Mills* [1990] 2 All ER 176, [1990] 1 WLR 445, CA (notice requiring completion in conformity with contract, ie within 15 working days of service, was not invalid although it went on to state consequences of failure to complete within 28 days of service. It operated as a contractual notice to complete, but subject to the time for completion being extended to 28 days after service). See also *Brickwoods Ltd v Butler and Walters* (1970) 23 P & CR 317, CA, where the purchasers' right to rescind under an escape clause did not preclude the vendor from serving notice to complete.

Under the Standard Conditions of Sale (3rd Edn), a party is ready, able and willing: (1) if he could be, but for the default of the other party; and (2) in the case of the vendor, even though a mortgage remains secured on the property, if the amount to be paid on completion enables the property to be transferred freed of all mortgages (except those to which the sale is expressly subject): condition 6.8.2(a), (b). This is designed to reverse the effect of *Cole v Rose* supra.

8 *Quadrangle Development and Construction Co Ltd v Jenner* [1974] 1 All ER 729, [1974] 1 WLR 68, CA.

9 *Re Stone and Saville's Contract* [1963] 1 All ER 353, [1963] 1 WLR 163, CA; *Rightside Properties Ltd v Gray* [1975] Ch 72, [1974] 2 All ER 1169. The clarity of the proposition in the text is perhaps clouded by *Woodar Investment Development Ltd v Wimpey Construction UK Ltd* [1980] 1 All ER 571, [1980] 1 WLR 277, HL, where it was held that unjustified rescission of a contract does not necessarily amount to repudiation of the contract, where the whole circumstances, including the conduct of the party purporting to rescind, do not evidence his intention to abandon the contract. However, that was a rather unusual case where, before the purported notice of rescission was served, there was a disagreement between the parties as to whether the purchasers were entitled to rescind, and the purchasers' service of a rescission notice could plausibly be regarded as without prejudice to their future performance of the contract, if (as happened) the notice should be held invalid.

10 See *Oakdown Ltd v Bernstein & Co (a firm)* (1984) 49 P & CR 282 at 294-296 per Scott J; but see 'Hold Everything' [1985] Conv 309.

11 *Schindler v Pigault* (1975) 30 P & CR 328, where the vendor was unable to rely on his notice to complete, when the delay was caused by his failure to give access to a sub-purchaser of whom he knew. A vendor whose failure to deduce title is the cause of a delayed completion cannot, at a later date, serve a valid notice to complete on a non-defaulting purchaser: *Country and Metropolitan Homes Surrey Ltd v Topclaim Ltd* [1996] Ch 307, [1997] 1 All ER 254.

12 *Carne v Debono* [1988] 3 All ER 485, [1988] 1 WLR 1107, CA.

13 *Phillips v Lamdin* [1949] 2 KB 33, [1949] 1 All ER 770; *Raineri v Miles (Wiejski, third party)* [1981] AC 1050, [1980] 2 All ER 145, HL; *Oakacre Ltd v Claire Cleaners (Holdings) Ltd* [1982] Ch 197, [1981] 3 All ER 667.

Under the Standard Conditions of Sale (3rd Edn), compensation is calculated at the contract rate on the purchase price, or (where the purchaser is the paying party) the purchase price less any deposit paid, for the period by which the paying party's default exceeds that of the receiving party, or, if shorter, the period between completion date and actual completion: condition 7.3.2. Any claim for loss resulting from delayed completion is to be reduced by any compensation payable under this condition: see condition 7.3.3. Where the purchaser holds the property as tenant of the vendor and completion is delayed, the vendor may give notice to the purchaser, before the date of actual completion, that he intends to take the net income from the property until completion; if he does so, he cannot claim compensation under condition 7.3.1 as well: condition 7.3.4. For the meaning of 'contract rate' see PARA 119 note 7 ante; and for the meaning of 'completion date' see PARA 102 note 5 ante. As to claims after completion see condition 7.4; and PARA 123 post.

14 See the Standard Conditions of Sale (3rd Edn), condition 7.5.2(a). This is subject to the court's unfettered power to order the return of the deposit under the Law of Property Act 1925 s 49(2): see further PARA 246 post.

15 See the Standard Conditions of Sale (3rd Edn), condition 7.5.2(b).



16 See the Standard Conditions of Sale (3rd Edn), condition 7.5.2(c); and PARA 232 et seq post.

17 *Hooker v Wyle* [1973] 3 All ER 707, [1974] 1 WLR 235, where vacation was ordered on summary proceedings. Cf *Clearbrook Property Holdings Ltd v Verrier* [1973] 3 All ER 614, [1974] 1 WLR 243 (triable issue where purchaser alleged oral extension of period of notice). As to vacation of the register generally see LAND CHARGES vol 26 (2004 Reissue) PARAS 645-646.

18 See the Standard Conditions of Sale (3rd Edn), condition 7.6.2(a).

19 In relation to contracts made after 27 September 1989 (ie the date of commencement of the Law of Property (Miscellaneous Provisions) Act 1989 s 3: see s 5(3), (4)), damages are no longer limited under the rule in *Bain v Fothergill* (1874) LR 7 HL 158: see the Law of Property (Miscellaneous Provisions) Act 1989 s 3; para 256 post; and DAMAGES vol 12(1) (Reissue) PARA 1059.

20 *Woods v Mackenzie Hill Ltd* [1975] 2 All ER 170, [1975] 1 WLR 613, where the vendors' contractual notice to complete was invalid, but the purchaser had still not completed some four months after the contractual date for completion; it was held that the delay was substantially more than a reasonable time, and the vendors' action for specific performance succeeded. This seems to cast doubt on the general proposition stated in *Rightside Properties Ltd v Gray* [1975] Ch 72, [1974] 2 All ER 1169, that a notice shorter than that provided for in the conditions of sale cannot be valid under the general law. In *Dimsdale Developments (South East) Ltd v De Haan* (1983) 47 P & CR 1, such a notice, invalid under the condition, was expressly held to be valid under the general law (but see the criticism by Thompson 'Case Notes. Notices to Complete and Associated Remedies' [1984] Conv 311). See also note 6 supra. In *Raineri v Miles (Wiejski, third party)* [1981] AC 1050, [1980] 2 All ER 145, HL, service of a contractual notice to complete after the date fixed for completion had passed did not divest the right to damages which accrued on the contractual date for completion.

21 *Sudagar Singh v Nazeer* [1979] Ch 474, [1978] 3 All ER 817.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

#### 121 Notice to complete

TEXT AND NOTES--Standard contract of sale provisions relating to notices to complete are subject to the law of waiver and estoppel: *Munro v Premier Associates Ltd* (2000) 80 P & CR 439.

NOTE 7--See also *Lambeth LBC v Vincent* [2000] 19 EG 145 (notice to complete valid because freeholder's notice claiming forfeiture of lease being sold invalid).

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#### 122. Interest on purchase money.

The conditions of sale may provide for payment of interest on the balance of the purchase money from the date fixed for completion until the actual date of payment, if the purchase is not completed at the date fixed<sup>1</sup>. The payment of interest varies according to the form of the

condition; it may be payable if the delay arises (1) from any cause whatever<sup>2</sup>; (2) from any cause whatever other than the vendor's wilful default; or (3) from the purchaser's default.

Whether the agreement for the payment of interest makes it payable in case of delay from any cause whatever<sup>3</sup>, or from any cause other than the vendor's wilful default<sup>4</sup>, the effect is the same, since even under the former words the purchaser is not bound to pay interest during delay due to the vendor's wilful default<sup>5</sup>, and such conditions are binding and compel the purchaser to pay interest unless he can bring the delay within the exception<sup>6</sup>. If the condition is framed under head (3) above, the purchaser is liable to pay interest only if the delay is attributable to him, and not if it is due to the state of the vendor's title<sup>7</sup>.

It is for the purchaser to show that the vendor was guilty of wilful default<sup>8</sup>, and that this wilful default was the cause of the non-completion of the contract on the date fixed<sup>9</sup>. Delay occasioned merely by the state of the title and not wilful on the part of the vendor does not relieve the purchaser from paying interest<sup>10</sup>.

Unless the contract provides otherwise, a purchaser cannot evade payment of interest under a condition by depositing the purchase money at a bank and giving notice to the vendor that he will only be liable for deposit interest<sup>11</sup>. Where the purchase money is paid into court in a specific performance action it still attracts interest while lodged in court<sup>12</sup>.

One form of standard condition provides that the purchaser is to pay interest at a specified rate<sup>13</sup> from the contractual completion date until the purchase is actually completed, unless the vendor is in default<sup>14</sup>. The vendor may instead elect to take the income (less outgoings) of the land<sup>15</sup>. Under this form of condition the vendor's right to take the income is dependent upon his right to charge interest, so that, if the delay is caused by his default, he may have neither interest nor income<sup>16</sup>. Where the delay arises from any cause other than the purchaser's neglect or default, he may place the balance of the purchase money on a deposit account and give notice to the vendor or his solicitor<sup>17</sup>, and the interest yielded by such deposit must be accepted by the vendor<sup>18</sup>.

The standard condition now in general use makes the payment of interest part of a more general condition relating to compensation for late completion<sup>19</sup>.

Both forms of condition have independent provisions regulating the payment of interest by a purchaser in possession before completion<sup>20</sup>.

1 See the Statutory Form of Conditions of Sale 1925, SR & O 1925/779, condition 4. Interest may be reserved at an increasing rate: *Herbert v Salisbury and Yeovil Rly Co* (1866) LR 2 Eq 221. This condition will not necessarily be read into a contract for sub-purchase in the same terms: *Re Keeble and Stillwell's Fletton Brick Co* (1898) 78 LT 383. As to the payment of interest where it is not expressly provided for see PARA 194 et seq post. Where there was a mere agreement to pay interest from the day fixed for completion without adding 'in case of delay from any cause whatever' the purchaser was allowed to avoid payment of interest by appropriating money to meet the purchase money: *Kershaw v Kershaw* (1869) LR 9 Eq 56; but see *Re Riley to Streatfield* (1886) 34 ChD 386; and PARA 197 post. A special condition merely providing for interest from the date for completion has been held not to be a variation of, or inconsistent with, a clause in the general conditions which contains a similar provision and also further terms relating to interest: *Re Debenham and Mercer's Contract* [1944] 1 All ER 364.

2 Formerly the condition seems to have been regarded as fixing only the rate of interest and leaving the actual payment to begin when the title was made: *Monk v Huskisson* (1827) 4 Russ 121n. Where the purchaser insisted on taking the rents and profits from the date fixed for completion and he conceded that he had to pay interest, but the vendor was in wilful default, the interest was chargeable at the court rate of 4% and not at the contract rate of 6%: *Manton v Mannion* [1958] IR 324.

3 *Vickers v Hand* (1859) 26 Beav 630; *Williams v Glenton* (1866) 1 Ch App 200.

4 *Re Riley to Streatfield* (1886) 34 ChD 386.

5 *Williams v Glenton* (1866) 1 Ch App 200 at 210; *Re Woods and Lewis' Contract* [1898] 1 Ch 433 at 436 (affd [1898] 2 Ch 211, CA) where, the word 'wilful' being omitted, the court held nevertheless that 'default' must

be construed as 'wilful default' and not in the sense of mere failure to perform. See also *Bennett v Stone* [1903] 1 Ch 509 at 525, CA; *Re Kissock and Taylor's Contract* [1916] 1 IR 393.

6 See the cases cited in notes 3-4 supra.

7 *Jones v Gardiner* [1902] 1 Ch 191. See also *Perry v Smith* (1842) Car & M 554; *Denning v Henderson* (1847) 1 De G & Sm 689.

8 A vendor is guilty of wilful default if he goes abroad on holiday two days before the date fixed for completion (*Re Young and Harston's Contract* (1885) 31 ChD 168, CA, where 'wilful' and 'default' were considered at 175 per Bowen LJ), or neglects to obtain the concurrence of necessary parties (*Re Earl of Strafford and Maples* [1896] 1 Ch 235 (on appeal [1896] 1 Ch 235 at 240, CA)), or, owing to his misinterpretation of the conditions of sale, refuses to deliver an abstract of title (*Re Pelly and Jacob's Contract* (1899) 80 LT 45), or, under a mistake of law, omits to obtain a conveyance from one of two trustee-mortgagees (*Re Hetling and Merton's Contract* [1893] 3 Ch 269 at 281, CA; *Re Postmaster-General and Colgan's Contract* [1906] 1 IR 287 (on appeal [1906] 1 IR 477, Ir CA), where the delay was due to the vendor's mistake as to the length of the tenancy of a party in possession), or underestimates the time necessary for completion (*Re Hewitt's Contract* [1963] 3 All ER 419, [1963] 1 WLR 1298), or, under the former law, if he neglected to procure admittance to copyholds (*Re Wilsons and Stevens' Contract* [1894] 3 Ch 546).

On the other hand, the vendor's oversight or honest mistake of fact is not wilful default, at least if not persisted in (*Bennett v Stone* [1902] 1 Ch 226 at 232; affd [1903] 1 Ch 509 at 520, 526, CA), nor is his repudiation of the contract and unsuccessful resistance to the purchaser's action for specific performance (*North v Percival* [1898] 2 Ch 128 where, at 135, Kekewich J defined 'wilful default' as obstruction in the completion of the contract). 'The honest belief of either party in the validity of his own view will not prevent such party being in default, though it may prevent such default being a wilful default within the meaning of the contract': *Re Bayley-Worthington and Cohen's Contract* [1909] 1 Ch 648 at 657 per Parker J, where earlier cases are considered.

9 *Re London Corp'n and Tubbs' Contract* [1894] 2 Ch 524 at 529, CA. The default must be the *causa causans* of the delay: *Bennett v Stone* [1902] 1 Ch 226 at 236; affd [1903] 1 Ch 509, CA.

10 *Sherwin v Shakspear* (1854) 5 De GM & G 517, where the condition read 'from any cause whatever'; *Vickers v Hand* (1859) 26 Beav 630 (overruling *De Visme v De Visme* (1849) 1 Mac & G 336); *Lord Palmerston v Turner* (1864) 33 Beav 524; *Williams v Glenton* (1865) 34 Beav 528 at 531 (affd (1866) 1 Ch App 200 at 206). In *Re Kissock and Taylor's Contract* [1916] 1 IR 393, Ir CA, however, a vendor who entered into the contract knowing that litigation into the title was pending by which completion was delayed by seven months was held to be guilty of wilful default notwithstanding that he had acted on counsel's opinion.

11 *Re Riley to Streatfield* (1886) 34 ChD 386. See also *Vickers v Hand* (1859) 26 Beav 630; and cf paras 196-197 post. In a vendor's action for specific performance, if the purchaser is in possession, he may be allowed the option of paying the purchase money and interest into court or giving up possession and paying the interest into court: *Greenwood v Turner* [1891] 2 Ch 144; *Re Cassano and Mackay's Contract* [1920] WN 7. As to the position of the parties pending completion see PARA 177 et seq post; and as to completion generally see PARA 262 et seq post.

12 *Pearlberg v May* [1951] Ch 699, [1951] 1 All ER 1001, CA.

13 The rate should be fixed as a percentage by a special condition. For the meaning of 'contract rate' in the Standard Conditions of Sale (3rd Edn) see PARA 119 note 7 ante. As to the Standard Conditions of Sale see PARA 1 note 9 ante.

14 See the National Conditions of Sale (20th Edn), condition 7(1). These conditions are no longer in general use, having been largely superseded by the Standard Conditions of Sale (3rd Edn): see PARA 1 note 9 ante.

15 See the National Conditions of Sale (20th Edn), condition 7(1)(i); and note 14 supra.

16 *Re Hewitt's Contract* [1963] 3 All ER 419, [1963] 1 WLR 1298, where the delay was attributable to the vendor's default when he underestimated the time necessary for completion.

17 See PARA 3 ante.

18 See the National Conditions of Sale (20th Edn), condition 7(1)(ii); and note 14 supra.

19 See the Standard Conditions of Sale (3rd Edn), condition 7.3; and PARA 121 ante.

20 See PARA 119 ante; cf *Re Priestley's Contract* [1947] Ch 469, [1947] 1 All ER 716. As to the liability under the general law of the vendor in occupation to pay a fair occupation rent see PARA 191 post.

## UPDATE

## 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/J. COMPLETION/123. Vacant possession.

### 123. Vacant possession.

The special conditions usually state whether or not the property is sold with vacant possession<sup>1</sup>. If no tenancies are disclosed and no statement is made as to possession, the implication is that the purchaser is to have vacant possession<sup>2</sup>. If printed conditions incorporate the particulars and the particulars state that vacant possession will be given on completion, the purchaser is entitled to such possession<sup>3</sup>. Since special conditions prevail over general conditions<sup>4</sup>, and since the provision for vacant possession is usually stated in the special conditions, it is essential that any qualification of that provision should also be stated in the special conditions<sup>5</sup>. Where a joint lessee has contracted to purchase the freehold and to resell it, he must obtain the consent of all other joint lessees before he can give vacant possession to the sub-purchaser<sup>6</sup>.

In order to give vacant possession, the vendor must eject not only those lawfully in possession but also any person who has no claim of right<sup>7</sup>. The right of a third person to take possession constitutes a breach<sup>8</sup>, as does a notice of intention to enter given by an authority exercising powers of compulsory purchase<sup>9</sup>. Subject to the de minimis rule, the vendor must remove all his goods from the premises<sup>10</sup>. The meaning of 'vacant possession' may vary with the context, but where a house is adapted for occupation by two households and the contract discloses a tenancy of the first floor but provides for vacant possession of the ground floor, a direction by the local authority that the house should be occupied by only one household precluded the vendors from giving vacant possession of the ground floor<sup>11</sup>.

A provision for vacant possession does not merge into the transfer on completion<sup>12</sup>.

Where a spouse's matrimonial home rights are a registered charge on the estate of the other spouse<sup>13</sup>, any contract for the sale of that estate by which the vendor agrees to give vacant possession will, subject to any contrary intention being expressed, contain a term requiring the vendor at his own expense to procure the cancellation of the registration of the charge<sup>14</sup>. This does not apply to any such contract made by a vendor who is entitled to sell the estate in the dwelling house freed from any such charge<sup>15</sup>.

1 See the Standard Conditions of Sale (3rd Edn), Special Condition 5. As to the Standard Conditions of Sale see PARA 1 note 9 ante.

2 *Cook v Taylor* [1942] Ch 349 at 354, [1942] 2 All ER 85 at 87; *Re Crosby's Contract, Crosby v Houghton* [1949] 1 All ER 830.

3 *Cook v Taylor* [1942] Ch 349, [1942] 2 All ER 85, where the particulars referring to vacant possession were supplied by the vendor's agent in the course of negotiations and not included in the contract.

4 See PARA 77 ante.

5 Cf *Korogluyan v Matheou* (1975) 30 P & CR 309; *Topfell Ltd v Galley Properties Ltd* [1979] 2 All ER 388, [1979] 1 WLR 446. In neither case did the judge advert expressly to the superior status of special conditions. Where the breach of the condition for vacant possession arises by virtue of a local land charge registered before the contract, it would seem that there is no need for an express qualification: see PARA 54 ante.

6 *Leek and Moorlands Building Society v Clark* [1952] 2 QB 788, [1952] 2 All ER 492, CA, where it was held that a surrender of a joint tenancy must be by all joint tenants.

7 *Cumberland Consolidated Holdings Ltd v Ireland* [1946] KB 264 at 270, [1946] 1 All ER 284 at 287, CA.

8 *Engell v Fitch* (1869) LR 4 QB 659, Ex Ch; *James Macara Ltd v Barclay* [1945] KB 148, [1944] 2 All ER 589, CA.

9 *Korogluyan v Matheou* (1975) 30 P & CR 309.

10 *Cumberland Consolidated Holdings Ltd v Ireland* [1946] KB 264, [1946] 1 All ER 284, CA (cellar full of rubbish); *Norwich Union Life Insurance Society v Preston* [1957] 2 All ER 428, [1957] 1 WLR 813 (furniture left on premises). See also *Hynes v Vaughan* (1985) 50 P & CR 444 (rubbish piles in garden and stables).

11 *Topfell Ltd v Galley Properties Ltd* [1979] 2 All ER 388, [1979] 1 WLR 446.

12 *Hissett v Reading Roofing Co Ltd* [1970] 1 All ER 122, [1969] 1 WLR 1757. The Standard Conditions of Sale (3rd Edn) provide that completion does not cancel liability to perform any outstanding obligation under the contract: condition 7.4. For the meaning of 'contract' see PARA 55 note 10 ante. See also PARA 293 post. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

13 See the Family Law Act 1996 ss 30 (as amended), 31; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 285 et seq.

14 See *ibid* Sch 4 para 3(1); and LAND CHARGES vol 26 (2004 Reissue) PARA 638. It is the duty of the vendor to obtain necessary consents to a sale and, if he has sold with vacant possession, to take proceedings to obtain possession from any person in possession who has no right to be there, although he would not usually be required to undertake difficult or uncertain litigation in order to secure any requisite consent or obtain vacant possession: see *Wroth v Tyler* [1974] Ch 30, [1973] 1 All ER 897 (spouse's charge registered after the date of the contract for sale). The term is deemed to have been performed by the delivery to the purchaser or his solicitor of an application by the spouse entitled to the charge for the cancellation of its registration: see the Family Law Act 1996 Sch 4 para 3(3); and LAND CHARGES vol 26 (2004 Reissue) PARA 638. As to the release of the statutory rights of occupation see PARA 6 ante. As to the consequences where cancellation of the registration is refused by the spouse entitled to the charge see *Wroth v Tyler* *supra*. See further PARAS 248, 252 post.

15 Family Law Act 1996 Sch 4 para 3(2).

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/J. COMPLETION/124. Entry into possession or receipt of rents.

#### 124. Entry into possession or receipt of rents.

It is usual to provide that upon completion of the purchase the purchaser is entitled to possession<sup>1</sup> or receipt of the rents and profits and that the income and outgoings of the property are to be apportioned either as from the day fixed for completion or from the date of

actual completion<sup>2</sup>. In the absence of stipulation the time fixed for completion is not the crucial date, and if a title has not been shown by that date, and there is no stipulation making the time fixed for completion the crucial date, the purchaser does not become entitled to the rents and profits and bound to discharge the outgoing until a good title is shown<sup>3</sup>.

1 As to what is vacant possession see PARA 123 ante.

2 The provisions of the standard conditions are complex and diverse: see the Statutory Form of Conditions of Sale 1925, SR & O 1925/779, condition 3; the Standard Conditions of Sale (3rd Edn), condition 6; the National Conditions of Sale (20th Edn), condition 6; and PARA 121 ante. As to the Conditions of Sale see PARA 1 note 9 ante. As to rents, profits, receipts and outgoing generally see PARA 188 et seq post. 'Possession' does not mean personal occupation if the purchaser has notice of a tenancy: *Lake v Dean* (1860) 28 Beav 607. As to the right to possession see further PARAS 185-186 post. Without a stipulation for apportionment, such outgoing can be apportioned as are apportionable at law: *Midgley v Coppock* (1879) 4 Ex D 309 at 313, CA. As to rents and other periodical payments see the Apportionment Act 1870 ss 3, 4; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 278. Rents should be made apportionable whether payable in advance or in arrear, for rent in advance is not apportionable except under special condition: *Ellis v Rowbotham* [1900] 1 QB 740, CA. It must be noted that under the Apportionment Act 1870 apportionment can only be in respect of time. Any apportionment between property conveyed and property not conveyed or upon any other basis than time must be specially provided for: *Coal Commission v Earl Fitzwilliam's Royalties Co* [1942] Ch 365, [1942] 2 All ER 56.

3 *Carrodus v Sharp* (1855) 20 Beav 56; *Barsht v Tagg* [1900] 1 Ch 231 at 234, 235; *Re Highett and Bird's Contract* [1902] 2 Ch 214 at 217 (affd [1903] 1 Ch 287, CA); *Bennett v Stone* [1903] 1 Ch 509 at 524, CA. See also PARA 188 et seq post. As to completion see further PARA 262 et seq post.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/J. COMPLETION/125. Meaning of 'outgoings'.

#### 125. Meaning of 'outgoings'.

The term 'outgoings' is of very wide import<sup>1</sup>, and includes not merely business rates<sup>2</sup>, rent, service charges, repairs and the ordinary expenses of cultivating or managing the property<sup>3</sup> but also expenses, even if of a capital nature, of works executed by local authorities under their public health, highway and other powers which are recoverable from the owner, and which are also, in general, charged on the property<sup>4</sup>.

1 See eg *Aldridge v Ferne* (1886) 17 QBD 212, DC; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 530. 'Outgoings' includes payments which the purchaser would have to meet if completion had taken place; in the case of a contract to grant a lease, it includes the rent to be reserved by the lease, but in the case of a contract to grant an underlease it does not include the head rent which would continue to be payable to the vendor: *Vangeen v Benjamin* (1976) 239 Estates Gazette 647.

2 The general rate is normally charged on the occupier, although in certain cases the owner may be liable: see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 12 et seq. As to the liability of occupiers who are in occupation for part only of a rate period see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARAS 26, 60-85 (non-domestic rating), 231, 243-267 (council tax). If the rate has not been made when the apportionment is made,

the calculation should be made according to the old rate: see the Statutory Form of Conditions of Sale 1925, SR & O 1925/779, condition 3(2); 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 60 note (s); 2 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 1232 note (i).

3 *Carrodus v Sharp* (1855) 20 Beav 56. See also *Belfast Bank v Callan* [1910] 1 IR 38. As to the recovery from a subsequent occupier of unpaid arrears for the supply of electricity see FUEL AND ENERGY vol 19(2) (2007 Reissue) PARA 1102.

4 Examples are expenses incurred by local authorities under the provisions now embodied in the Highways Act 1980 ss 205-218 (as amended) (replacing the Private Street Works Act 1892) (see HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 149 et seq) (see *Stock v Meakin* [1900] 1 Ch 683, CA, followed in *Surtees v Woodhouse* [1903] 1 KB 396, CA) or under local improvement Acts (see *Midgley v Coppock* (1879) 4 Ex D 309, CA), the expenses of abating a nuisance under public health legislation (see *Barsht v Tagg* [1900] 1 Ch 231) or of pulling down dangerous structures under the London Building Acts (Amendment) Act 1939 (repealed in part) (see *Tubbs v Wynne* [1897] 1 QB 74; and as to the recovery of such expenses generally see BUILDING; ENVIRONMENTAL QUALITY AND PUBLIC HEALTH).

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### 125-126 Meaning of 'outgoings', Expenses charged on the property

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

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### 126. Expenses charged on the property.

Unless the conditions of sale provide to the contrary<sup>1</sup>, capital expenses incurred by and payable to a local authority in respect of work done are not apportionable. Under the general law, the liability for those expenses as between vendor and purchaser depends on whether or not they are charged on the property, and, if so charged, when the charge was created. Where a charge is created<sup>2</sup> it usually attaches to the premises on the execution of the works, and not at the time when the apportionment is made by the local authority among the various premises affected, and the expenses must be borne by the vendor or purchaser according to whether the works are completed before or after the date fixed for completion<sup>3</sup>. If the expenses are not a charge upon the premises but the contract for sale contains a condition rendering the vendor liable to pay outgoings up to the date fixed for completion and the purchaser liable after that date, the expenses under the condition fall upon the vendor or the purchaser according to whether they become payable before or after the date for completion<sup>4</sup>. In the absence of conditions, it seems that the vendor is liable for expenses which become payable up to the time when a good title is shown<sup>5</sup>, but a purchaser who pays by reason of his liability as owner for the time being cannot recover the amount from the vendor on the vendor's covenants for title where the expenses are not a charge on the property<sup>6</sup>.

Charges acquired by local authorities or certain other authorities in respect of such expenses, and sums recoverable by them from various owners of property, are in general registrable as local land charges<sup>7</sup>. However, failure to register does not make the charge void against a purchaser, but the purchaser may be entitled to compensation<sup>8</sup>. A general charge not specifying any amount may be registered as soon as the authority has expended money for any purpose which, when the work is completed and any requisite resolution passed or order made, will confer a charge on the land<sup>9</sup>. This will be replaced in due course by a specific charge specifying the amount secured<sup>10</sup>. The standard conditions now in general use provide that the property is sold subject to certain incumbrances<sup>11</sup>, including registered local land charges<sup>12</sup> and 'public requirements'<sup>13</sup>.

1 As to the position under the Standard Conditions of Sale (3rd Edn) see the text and notes 11-13 infra. As to the Standard Conditions of Sale see PARA 1 note 9 ante.

2 Egg under the Highways Act 1980 ss 212, 305: see PARA 125 note 4 ante.

3 *Stock v Meakin* [1900] 1 Ch 683, CA; *Re Waterhouse's Contract* (1900) 44 Sol Jo 645; *Re Allen and Driscoll's Contract* [1904] 2 Ch 226 at 230, CA; *Millard v Balby-with-Hexthorpe Urban Council* [1905] 1 KB 60, CA. Under a particular statute the expenses may become a charge on the land upon the local authority approving the assessment, notwithstanding that the work has been completed earlier: *Re Farrer and Gilbert's Contract* [1914] 1 Ch 125, CA.

4 *Midgley v Coppock* (1879) 4 Ex D 309, CA; *Tubbs v Wynne* [1897] 1 QB 74; and see *Barsht v Tagg* [1900] 1 Ch 231.

5 *Barsht v Tagg* [1900] 1 Ch 231.

6 *Egg v Blayney* (1888) 21 QBD 107, DC (expenses arising under the Metropolis Management Amendment Act 1862 s 77 (repealed)).

7 See the Local Land Charges Act 1975 s 1(1) (as amended); and LAND CHARGES vol 26 (2004 Reissue) PARAS 676-677.

8 See *ibid* s 10 (as amended); and LAND CHARGES vol 26 (2004 Reissue) PARA 694.

9 See *ibid* s 6(1), (2); the Local Land Charges Rules 1977, SI 1977/985, r 2(2); and LAND CHARGES vol 26 (2004 Reissue) PARA 676. A general charge is in effect a memorandum that at some future date there may be a charge on the property: *Re Middleton and Young's Contract* [1929] WN 70. See also note 12 infra.

10 See the Local Land Charges Act 1975 s 1(1)(a) (as amended); the Local Land Charges Rules 1977/985, r 2(2); and LAND CHARGES vol 26 (2004 Reissue) PARA 677.

11 See the Standard Conditions of Sale (3rd Edn), condition 3.1; and PARA 55 ante.

12 See the Standard Conditions of Sale (3rd Edn), condition 3.1.2(d); and PARA 55 ante. After the contract is made, the vendor is to give the purchaser written details without delay of any new public requirement and of anything in writing which he learns about concerning any incumbrances subject to which the property is sold: condition 3.1.3. For the meaning of 'contract' see PARA 55 note 10 ante; and for the meaning of 'public requirement' see PARA 55 note 14 ante.

See also the National Conditions of Sale (20th Edn), condition 16, under which the purchaser must at his own expense comply with any 'requirement' made by a local authority after the date of the contract. See also *Re Leyland and Taylor's Contract* [1900] 2 Ch 625, CA. Where before the date of the contract a local authority registered as a local land charge a resolution approving plans and a provisional apportionment under what is now the Highways Act 1980 s 205 (as amended) (see PARA 125 note 4 ante), and also served notice of the resolution and apportionment on the vendor, the entry was held not to be a 'local land charge required to be registered' (since registration was voluntary) but to be an 'other local land charge' for the purpose of the condition requiring the vendor to indemnify the purchaser against local land charges required to be registered, and duly registered, before the date of the contract or other local land charges of which he had notice before that date: *Re Middleton and Young's Contract* [1929] WN 70, where the charge appears to have been registered as a general charge. Such a charge cannot be registered until money has been expended (see the text and note 9 supra), and a mere resolution or notice issued in respect of it is not registrable: see PARA 16 ante. Conditions sometimes provide that money becoming receivable or payable under an Act or a planning or other scheme is to be receivable or payable by the vendor if it has become receivable or payable before the date of the contract, and by the purchaser if it becomes receivable or payable after that date. Such a condition will cover



eg compensation for refusal or revocation of planning permission under the Town and Country Planning Act 1990 Pt III (ss 55-106B) (as amended), Pt IV (ss 107-118) (as amended) (see TOWN AND COUNTRY PLANNING vol 46(2) (Reissue) PARA 914 et seq), or refund of advance payments made by owners of new buildings in respect of street works (see the Highways Act 1980 s 219 (as amended)); and HIGHWAYS, STREETS AND BRIDGES vol 21 (2004 Reissue) PARA 179 et seq).

13 See the Standard Conditions of Sale (3rd Edn), condition 3.1.2(e); and PARA 55 ante. The purchaser is to bear the cost of complying with any outstanding public requirement and is to indemnify the vendor against any liability resulting from a public requirement: condition 3.1.4.

## **UPDATE**

### **1-136 The Contract and Preliminary Matters**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### **125-126 Meaning of 'outgoings', Expenses charged on the property**

Certain functions under provisions mentioned in these paragraphs are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/J. COMPLETION/127. Sale to sitting tenant.

### **127. Sale to sitting tenant.**

Where a tenant, under any kind of lease or tenancy, enters into an agreement with his landlord to purchase the premises in which he is residing, and thereby acquires an immediate equitable interest in the demised premises which is inconsistent with the continuance of the lease, there is no presumption that upon the conclusion of the agreement the lease is determined by surrender or otherwise and the effect of the agreement depends in all cases upon its particular terms<sup>1</sup>. Where the terms of the agreement are such as to render its performance incompatible with a continuance of the lease, it operates to determine the lease<sup>2</sup>.

The vendor cannot in any case be entitled both to the rent and to interest on the purchase money<sup>3</sup>, and a condition should be inserted to make it clear to what he is entitled. A condition avoiding such difficulties is one providing that nothing contained in the contract (or in the option where the purchase is in exercise of an option in the lease) is to operate to determine the tenancy until the purchase money has been paid in full. Such a special condition seems desirable, since problems might otherwise occur if, for any reason, the purchaser failed to complete.

Where the sale is to a sitting tenant exercising his statutory right of enfranchisement<sup>4</sup> the conditions of sale provide, subject to contrary agreement, that rent continues to be payable until actual completion, unless the landlord elects to receive interest instead of rent<sup>5</sup>.

1 *Doe d Gray v Stanion* (1836) 1 M & W 695 at 701; *Tarte v Darby* (1846) 15 M & W 601; *Ellis v Wright* (1897) 76 LT 522; *Leek and Moorlands Building Society v Clark* [1952] 2 QB 788, [1952] 2 All ER 492, CA; *Nightingale v Courtney* [1954] 1 QB 399, [1954] 1 All ER 362, CA; *Watney v Boardley* [1975] 2 All ER 644,

[1975] 1 WLR 857. See also PARA 195 note 11 post; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 640-641. A provision for rescission of the agreement by the vendor may be sufficient to prevent termination of the lease: see *Raffety v Schofield* [1897] 1 Ch 937.

2 *Turner v Watts* (1928) 97 LJB 403, CA, where interest was payable from the date of the agreement; *Cockwell v Romford Sanitary Steam Laundry Ltd* [1939] 4 All ER 370, CA, where interest was payable from the expiration of the notice exercising an option to purchase; *Watney v Boardley* [1975] 2 All ER 644, [1975] 1 WLR 857, where the purchase price was due on the date of exercise of an option, with interest from that date until payment together with arrears of rent up to that date.

3 See *Brooke v Champenowne* (1837) 4 Cl & Fin 589 at 611, HL.

4 Le under the Leasehold Reform Act 1967 Pt I (ss 1-37) (as amended): see LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1389 et seq.

5 Leasehold Reform (Enfranchisement and Extension) Regulations 1967, SI 1967/1879, reg 2, Schedule, Pt I paras 7, 8.

## UPDATE

### 1-136 The Contract and Preliminary Matters

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Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/. COMPLETION/128. Payment of purchase money by instalments.

### 128. Payment of purchase money by instalments.

A condition for the payment of the purchase money by instalments should provide for the insurance and repair of the property and for forfeiture on failure to pay any instalment<sup>1</sup>. The vendor will have a lien on the property for unpaid instalments of the purchase price<sup>2</sup>. Such a lien is registrable as a land charge<sup>3</sup>, but where the vendor retains (as he usually does) the documents of title of the property pending completion of payment by instalments, this retention of documents probably prevents the registration of the lien<sup>4</sup>. On the other hand, the purchaser can protect his position by a registration of the contract as an estate contract<sup>5</sup>. He should require the condition to provide for at least the form of the transfer<sup>6</sup> to be settled and scheduled to the agreement, for if this is left until all the instalments have been paid he will be in no position to negotiate its contents. If he is to be let into possession before completion, care should be taken not to create a tenancy which might enjoy statutory protection<sup>7</sup>. It must be clearly stated in the condition who is to pay any outgoing, whether of a periodic or capital nature, and who is to receive any payment of a similar nature during the continuance of the agreement<sup>8</sup>.

1 As to the operation of such a condition see PARA 232 note 9 post. The condition takes the form of a power for the vendor to resell on default.

2 See LIEN vol 68 (2008) PARA 859 et seq.

3 See the Land Charges Act 1972 s 2(4) (as amended), Class C(iii); and LAND CHARGES vol 26 (2004 Reissue) PARA 631; LIEN vol 68 (2008) PARA 859. In the case of registered land, the lien may be protected by a notice or caution, but if the vendor is in actual occupation the lien is an overriding interest under the Land Registration

Act 1925 s 70(1)(g): *London and Cheshire Insurance Co Ltd v Laplagrene Property Co Ltd* [1971] Ch 499, [1971] 1 All ER 766; and see LAND REGISTRATION. Where the vendor is a limited company, the lien is not registrable under what is now the Companies Act 1985 s 395 (see COMPANIES vol 15 (2009) PARA 1279): *London and Cheshire Insurance Co Ltd v Laplagrene Property Co Ltd* supra.

4 See the Land Charges Act 1972 s 2(4)(iii) proviso (a), which excepts a charge protected by the deposit of documents relating to the legal estate. The Law of Property Act 1925 does not prejudicially affect the right or interest of any person arising out of or consequent on the possession of any such document: s 13.

5 See the Land Charges Act 1972 s 2(4) (as amended), Class C(iv); and LAND CHARGES vol 26 (2004 Reissue) PARAS 628, 632. In the case of registered land, the contract may be protected by an entry on the register, but if the purchaser is in actual occupation the contract will be an overriding interest: see LAND REGISTRATION vol 26 (2004 Reissue) PARAS 863 et seq, 960 et seq.

6 As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

7 See PARA 119 ante.

8 See eg *Re Watford Corp'n's and Ware's Contract* [1943] Ch 82, [1943] 1 All ER 54, where, under an agreement made in 1927, it was held that instalments of the war damage contribution fell on the vendor in the absence of a provision to the contrary.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### 128 Payment of purchase money by instalments

NOTE 3--Land Registration Act 1925 repealed and replaced by the Land Registration Act 2002; see LAND REGISTRATION.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/K. TRANSFER AND CUSTODY OF TITLE DEEDS/129. Expenses of preparing transfer.

## K. TRANSFER AND CUSTODY OF TITLE DEEDS

### 129. Expenses of preparing transfer.

In the absence of conditions, the purchaser prepares the draft transfer at his own expense<sup>1</sup>, but the expense of perusal and execution by the vendor and all other necessary parties falls on the vendor<sup>2</sup>, who also bears the expense of any act necessary for completing his own title<sup>3</sup>. The conditions do not in general vary this practice as regards the preparation of the draft transfer<sup>4</sup> and the perusal and execution by the vendor, but a provision is sometimes inserted that the purchaser is to meet the cost of every act or thing required for perfecting or completing the vendor's title except the expenses of tracing and getting in any outstanding legal estate<sup>5</sup>. The purchaser is not bound to take a transfer with the concurrence of persons entitled to an equitable interest if the title can be discharged from the interest under a trust<sup>6</sup>, or the Settled Land Act 1925<sup>7</sup> or other statute<sup>8</sup>. If the transfer is made with the concurrence of a person

entitled to a registered incumbrance, where the registration is not cancelled, the concurrence must be free of expense to the purchaser<sup>9</sup>. Formerly the conditions might provide that the expense of getting in an outstanding legal estate should be borne by the purchaser<sup>10</sup>, but a stipulation to this effect is now void<sup>11</sup>. Where the purchaser is bound to execute the transfer, it may be desirable to provide that a duplicate transfer or a separate acknowledgment of the vendor's right to production and an undertaking for safe custody is to be prepared, engrossed and stamped by and at the vendor's expense and that for the purpose of denoting the stamp the purchaser must produce the original<sup>12</sup>.

1 As to the preparation of the transfer generally see PARA 262 post. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

2 *Poole v Hill* (1840) 6 M & W 835; and see PARA 324 post.

3 See *Reeves v Gill* (1838) 1 Beav 375. As to the expense of getting in an outstanding legal estate see the text and notes 10-11 infra. On a sale of an estate in lots under conditions which throw a common incumbrance on one lot exclusively, the other purchasers are entitled to an indemnity from the purchaser of that lot: *Casamajor v Strobe* (1819) 2 Swan 347; affd (1821) Jac 630.

4 See PARA 262 note 6 post.

5 Cf the Standard Conditions of Sale (3rd Edn), conditions 4.1.2, 4.5. As to the Standard Conditions of Sale see PARA 1 note 9 ante. Under a condition that the transfer is to be made at the purchaser's expense, the purchaser is not liable for the expense of procuring the concurrence of necessary parties other than the vendor: *Paramore v Greenslade* (1853) 1 Sm & G 541 at 544.

6 See PARA 146 post.

7 See the Settled Land Act 1925 s 72(2); and SETTLEMENTS vol 42 (Reissue) PARA 874.

8 See the Law of Property Act 1925 s 42(1) (as amended); and PARAS 147, 271-273 post.

9 See *ibid* s 43(1).

10 If the condition merely aimed at the getting in of an outstanding legal estate, it did not apply to an unsatisfied mortgage estate or term (*Stronge v Hawkes* (1856) 2 Jur NS 388; cf *Hopkinson v Chamberlain* [1908] 1 Ch 853), but if the purchaser agreed to bear the expense of 'preparing, obtaining, making, and doing every assurance and every act and thing necessary for perfecting or completing the vendor's title', he had to bear the whole expense of procuring the concurrence of the vendor's mortgagees (*Re Willett and Argenti* (1889) 60 LT 735; cf *Re Sander and Walford's Contract* (1900) 83 LT 316, where the words were not so wide and did not extend to the costs of perusal and execution of the conveyance by a mortgagee), or of the execution of a deed to confirm an imperfectly executed conveyance to the vendor himself (*Re Woods and Lewis' Contract* [1898] 1 Ch 433 at 437). However, such a condition did not absolve the vendor from his duty of deducing, at his own expense, a title to any outstanding legal estate: *Re Adams' Trustees' and Frost's Contract* [1907] 1 Ch 695 at 703; cf *Sheerness Waterworks Co (Official Manager) v Polson* (1861) 3 De GF & J 36.

11 See the Law of Property Act 1925 s 42(3). As to the operation of the Limitation Act 1980 s 17 in extinguishing an outstanding legal estate in unregistered land cf LIMITATION PERIODS vol 68 (2008) PARA 940; and LAND REGISTRATION vol 26 (2004 Reissue) PARAS 1021, 1023 (effect of acquisition of title by possession in the case of registered land). See also *Jessamine Investment Co v Schwartz* [1978] QB 264, [1976] 3 All ER 521; *Spectrum Investment Co v Holmes* [1981] 1 All ER 6, [1981] 1 WLR 221; *Central London Commercial Estates Ltd v Kato Kagaku Co Ltd* [1998] 4 All ER 948, [1998] TLR 475. Many outstanding legal estates were got in on 1 January 1926 by the operation of the Law of Property Act 1925 s 39 (as amended), Sch 1, Pt II para 3.

12 As to the stamp duty on a duplicate see STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1079.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information

relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/K. TRANSFER AND CUSTODY OF TITLE DEEDS/130. Free transfer.

### **130. Free transfer.**

A provision is sometimes inserted in a contract for sale entitling the purchaser to a free transfer on his submitting to certain restrictions on the proof of title. Certain restrictions have been placed by statute on the terms of such a condition. Any stipulation is void which provides for the transfer or the registration of the purchaser's title to be prepared or carried out at the purchaser's expense by a solicitor appointed by or acting for the vendor or which might restrict a purchaser in selecting a solicitor to act on his behalf<sup>1</sup>. It is, however, lawful for the vendor to reserve the right to furnish a form of transfer from which a draft can be prepared, and to charge a reasonable fee for it<sup>2</sup>. The condition for a free transfer usually stipulates that the purchaser is to make no investigation of title and, provided he is not excluded from employing a solicitor of his own choice, this does not appear to be contrary to statute<sup>3</sup>. A purchaser who is given a right to a free transfer does not thereby without more lose his right to receive an abstract of title, and, if he is to be debarred from receiving an abstract, this must be specifically stated<sup>4</sup>.

1 Law of Property Act 1925 s 48(1). In s 48 a reference to a solicitor includes a licensed conveyancer within the Administration of Justice Act 1985 s 11(2) (see LEGAL PROFESSIONS vol 66 (2009) PARA 1319) or a recognised body within s 9 (see LEGAL PROFESSIONS vol 65 (2008) PARA 688) and s 32 (see LEGAL PROFESSIONS vol 66 (2009) PARA 1392); see s 34(2), Sch 2 para 37. See also PARA 3 ante. If the sale is effected by demise or sub-demise, the instrument giving effect to the transaction is deemed to be a transfer for this purpose, but the law relating to the preparation of a lease or underlease is not otherwise affected: Law of Property Act 1925 s 48(1), (3). It seems that a condition which merely provides that on a sale effected by demise or sub-demise the lease or underlease is to be prepared by the vendor's solicitor is valid. For an example of such a condition see the National Conditions of Sale (20th Edn), condition 19(1). As to the Conditions of Sale see PARA 1 note 9 ante. Any stipulation which provides that an assignment of a lease or underlease is to be prepared by the lessor, underlessor or his solicitor at the purchaser's expense is void (see the Law of Property Act 1925 s 48(2), (4)), but where such a stipulation is void a covenant is implied in lieu of it that the lessee or underlessee will register assignments (including probates and letters of administration) with the lessor or his solicitor and will pay a fee in respect of such registration, and the power of re-entry, if any, applies to a breach of such an implied covenant (see s 48(2) proviso). As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

2 Ibid s 48(1) proviso. Where the only consideration is the reservation of a perpetual rentcharge, the vendor may stipulate that the draft transfer is to be prepared by his solicitor at the purchaser's expense: s 48(1) proviso. This seems unlikely to be used now, however, since the exceptional cases where a rentcharge may be validly created after 22 August 1977 seem unlikely to fall within the statutory provision: see the Rentcharges Act 1977 s 2 (as amended); and RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 774 et seq. As to the execution of the transfer in duplicate see PARA 262 note 5 post.

3 Such conditions are usually employed where an estate is sold in lots. Such transactions are now, however, greatly simplified and cheapened by registering the title at the Land Registry and selling the individual lots as registered land. As to the registration of the lots under different numbers with a view to facilitating future transactions see LAND REGISTRATION. Advantage may also be taken of the Land Registry's Title Shown Procedure: see Ruoff and Roper, Registered Conveyancing (Looseleaf Edn) PARAS 12-63.

4 *Re Pelly and Jacob's Contract* (1899) 80 LT 45. As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 post.

### **UPDATE**

## 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/K. TRANSFER AND CUSTODY OF TITLE DEEDS/131. Transfer and retention of title deeds.

### 131. Transfer and retention of title deeds.

Since the owner of the land is entitled to possession of the title deeds<sup>1</sup>, the vendor must hand over all documents of title which are in his possession and relate exclusively to the property sold, and in the absence of stipulation to the contrary he must bear the cost of obtaining them if they are not in his possession<sup>2</sup>. However, where the vendor retains part of the land to which any documents of title relate, he is entitled to retain such documents<sup>3</sup>. He is also entitled to retain a document of title which is a trust instrument or other instrument creating a trust which is still subsisting, or an instrument relating to the appointment or discharge of a trustee of a subsisting trust<sup>4</sup>. Where land is sold in lots, the purchaser whose purchase price is the largest is entitled to the deeds relating to the several lots<sup>5</sup>. It is the practice to provide expressly to the same effect. Thus a usual condition of sale stipulates, with respect to common title deeds, that the vendor is to retain them if any lots are unsold, and that as between different purchasers they are to go to the purchaser who pays in the aggregate the largest purchase price, and that he is to give an acknowledgment of right to production and undertaking for safe custody to each of the other purchasers at their expense<sup>6</sup>.

1 *Austin v Croome* (1842) Car & M 653; *Re Williams and Duchess of Newcastle's Contract* [1897] 2 Ch 144 at 148; *Clayton v Clayton* [1930] 2 Ch 12. As to the right of a mortgagee to title deeds see MORTGAGE vol 77 (2010) PARA 486. As to the custody of title deeds in general and the right of a tenant for life to custody see REAL PROPERTY vol 39(2) (Reissue) PARAS 86-87. Title deeds are property within the Married Women's Property Act 1882 s 17 (as amended): *Re Knight's Question* [1959] Ch 381, [1958] 1 All ER 812; and see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 227.

2 *Re Duthy and Jesson's Contract* [1898] 1 Ch 419. Cf the National Conditions of Sale (20th Edn), condition 12(3). As to the Conditions of Sale see PARA 1 note 9 ante. An agreement to give 'real security' against loss of title deeds will be specifically enforced: *Walker v Barnes* (1818) 3 Madd 247. The fact that the consideration is a rentcharge does not, apparently, entitle the vendor to retain the deeds: 1 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 582. As to the production of title deeds for proof of title see PARA 150 post.

3 Law of Property Act 1925 s 45(9)(a). Hence, on a sale of land by a mortgagee whose security also includes personal property, the purchaser is, in the absence of a special condition, entitled to the mortgage deed, notwithstanding that the mortgagee retains the personal property (*Re Williams and Duchess of Newcastle's Contract* [1897] 2 Ch 144 at 148), unless the instrument relates to a trust and can be retained under the Law of Property Act 1925 s 45(9)(b). Documents showing the extinguishment of an easement in regard to which land retained by the vendor was the servient tenement and land sold was the dominant tenement are properly retained by the vendor: *Re Lehmann and Walker's Contract* [1906] 2 Ch 640. Since 'land' is defined in the Law of Property Act 1925 s 205(1)(ix) (as amended), to include an easement, it would appear that documents relating solely to easements are in the same position as the documents relating to the land itself.

4 *Ibid* s 45(9)(b). As to the purchaser's right to have notice of restrictive covenants indorsed on or permanently annexed to a document of title retained by the vendor see s 200; and PARA 298 post. The Standard Conditions of Sale (3rd Edn) do not contain any provision entitling the purchaser to indorsement of a sale of part

of the vendor's land. There should be no problem if the vendor's title is registered, but if it is not registered a special condition should provide for indorsement. As to the Standard Conditions of Sale see PARA 1 note 9 ante.

5 *Griffiths v Hatchard* (1854) 1 K & J 17.

6 See *Strong v Strong* (1858) 6 WR 455. Under a condition that the deeds are to go to the purchaser of 'the largest lot', the purchaser of the largest single lot in extent takes them, even though the purchase money paid by another purchaser may be greater (*Griffiths v Hatchard* (1854) 1 K & J 17) and, a fortiori, the purchaser of the largest single lot both in extent and value (*Scott v Jackman* (1855) 21 Beav 110; and see *Cunningham v Hume* (1839) 1 I Eq R 150). As to successive sales see *Re Lowe, Capel v Lowe* (1901) 36 L Jo 73. The purchaser of part of the property under an open contract is not entitled to title deeds which relate to the whole property even if the deeds are in the hands of persons who have ceased to have any title to any part of the property, and he must rely upon his equitable right to production: *Re Jenkins and Commercial Electric Theatre Co's Contract* (1917) 61 Sol Jo 283.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/ (6) CONDITIONS OF SALE AND SPECIAL CONDITIONS/ (ii) Rights under Particular Conditions/K. TRANSFER AND CUSTODY OF TITLE DEEDS/132. Right to production of deeds.

### 132. Right to production of deeds.

Where documents of title are retained by the vendor, the purchaser is, in the absence of stipulation to the contrary, entitled at his own expense to have attested copies of them<sup>1</sup>. He is also entitled at his own expense<sup>2</sup> to a covenant for, or an acknowledgment of his right to, production, and, unless the vendor is a trustee or mortgagee, an undertaking for their safe custody<sup>3</sup>. The vendor's inability to furnish the purchaser with a legal covenant or acknowledgment for production is not an objection to his title if the purchaser will, on completion, have an equitable right to production<sup>4</sup>. Where the vendor is a personal representative, the purchaser is entitled to an acknowledgment for production of the grant of probate or letters of administration<sup>5</sup> and to have a memorandum of the transfer indorsed on the grant<sup>6</sup>.

1 See the Law of Property Act 1925 s 45(4); *Dare v Tucker* (1801) 6 Ves 460; *Boughton v Jewell* (1808) 15 Ves 176. The purchaser is not entitled to copies of deeds which are produced as negative evidence that the property was not comprised in them: Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 436.

2 See the Law of Property Act 1925 s 45(8); and PARA 323 post.

3 See *ibid* s 64; and PARA 299 post. Cf *Yates v Plumbe* (1854) 2 Sm & G 174. The right to an acknowledgment replaces in practice the former right to a covenant for production: *Cooper v Emery* (1844) 1 Ph 388 at 390.

4 Law of Property Act 1925 s 45(7); and see PARA 299 post.

5 *Re Miller and Pickersgill's Contract* [1931] 1 Ch 511.

## UPDATE

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(7) SALES UNDER ORDERS OF THE COURT/133. Power to order sale of land.

## (7) SALES UNDER ORDERS OF THE COURT

### 133. Power to order sale of land.

Where in any cause or matter in the Chancery Division relating to any land<sup>1</sup> it appears necessary or expedient for the purposes of the cause or matter that the land or any part of it should be sold, the court may order that land or part to be sold<sup>2</sup>. The effect of the order is to bind the legal and equitable interests in the land sold of all persons who are either parties to or bound by the proceedings in which the order is made<sup>3</sup>, and on a transfer of the legal estate to the purchaser the concurrence of persons who have only equitable interests is not necessary<sup>4</sup>. Any party bound by the order and in possession of the land or part, or in receipt of the rents and profits of it, may be compelled to deliver up that possession or receipt to the purchaser or to such other person as the court may direct<sup>5</sup>. The order cannot be invalidated as against a purchaser on the ground of want of jurisdiction or of any concurrence, consent, notice or service, whether or not the purchaser has notice of any such want<sup>6</sup>. Where an order for sale has been made, a sale otherwise than under the order will not be permitted<sup>7</sup>.

The county court has a corresponding jurisdiction where the matter falls within the financial limits of its jurisdiction<sup>8</sup> or where the parties consent<sup>9</sup>.

1 'Land' includes any interest in or right over land: CPR Sch 1 RSC Ord 31 r 1. This now includes an interest under a trust for sale: see the Trusts of Land and Appointment of Trustees Act 1996 s 3; and TRUSTS vol 48 (2007 Reissue) PARA 967.

As from 26 April 1999, the Civil Procedure Rules (CPR) replace the Rules of the Supreme Court and the County Court Rules. Certain provisions of the RSC and CCR are saved in a modified form in CPR Schs 1 and 2 respectively. The CPR apply to proceedings issued on or after 26 April 1999, and new steps taken in existing proceedings, as prescribed: CPR 51; *Practice Direction--Transitional Arrangements* (1999) PD51. As to the principles underlying the new rules see CPR Pt 1.

At the date at which this volume states the law, the extent, if any, to which cases decided under RSC or CCR may be cited in relation to CPR, is unclear. It is thought that they will be persuasive where the same word or concept is used (and binding if subsequently adopted by the court), but in relation to the exercise of a discretion will be of less value in the light of the overriding objective. See further the introduction to Civil Court Practice 1999. Accordingly, cases cited in this title in amplification or explanation of the former rules will be binding over proceedings conducted under those rules, but should be viewed with caution in relation to proceedings conducted under the new regime.

2 CPR Sch 1 RSC Ord 31 r 1. The original jurisdiction of the Court of Chancery seems to have extended only to: (1) sales in satisfaction of creditors' claims enforceable in equity against the land; (2) sales in execution of valid trusts for sale; (3) sales for the purpose of enforcing equitable liens; and (4) sales of partnership land on dissolution: see *Mackreth v Symmons* (1808) 15 Ves 329; *Featherstonhaugh v Fenwick* (1810) 17 Ves 298;



*Lechmere v Brasier* (1821) 2 Jac & W 287; *Calvert v Godfrey* (1843) 6 Beav 97. See also LIEN vol 68 (2008) PARA 880; PARTNERSHIP vol 79 (2008) PARAS 208-210; TRUSTS vol 48 (2007 Reissue) PARA 882. This original jurisdiction and the statutory jurisdiction conferred by 15 & 16 Vict c 86 (Court of Chancery Procedure) (1852) passed to the High Court under the Supreme Court of Judicature Act 1873 s 16 (repealed), and was mainly exercisable in the Chancery Division (s 34(3) (repealed)), which now has jurisdiction by virtue of the Supreme Court Act 1981 ss 19, 61(1), Sch 1 para 1(a): see CIVIL PROCEDURE. Power to order the sale of land delivered to a judgment creditor by way of execution was conferred by the Judgments Act 1864 s 4 (repealed), but this power has been replaced by the power to charge the land of judgment debtors under the Charging Orders Act 1979 s 1(1): see CIVIL PROCEDURE vol 12 (2009) PARA 1467. Power to order a sale in redemption or foreclosure actions conferred by the Law of Property Act 1925 s 91 (as amended) (see MORTGAGE vol 77 (2010) PARA 101 et seq) is supplemented by CPR Sch 1 RSC Ord 31 r 1, which enables the court to make an order for sale in a debenture holder's action: see *Re Crigglestone Coal Co, Stewart v Crigglestone Coal Co* [1906] 1 Ch 523; and COMPANIES vol 15 (2009) PARAS 1379, 1380. As to the court's power to make an order relating to the exercise by trustees of land of any of their functions, including their powers of sale, see the Trusts of Land and Appointment of Trustees Act 1996 s 14; and SETTLEMENTS vol 42 (Reissue) PARA 905.

3 As to who is bound by an order made in representative proceedings see CPR Sch 1 RSC Ord 15 rr 12(3), 13(3), (4), 14(1), 15(1); CIVIL PROCEDURE; EXECUTORS AND ADMINISTRATORS.

4 *Massy v Batwell* (1843) 4 Dr & War 58; *Cole v Sewell* (1849) 17 Sim 40; *Re Williams' Estate* (1852) 5 De G & Sm 515; *Cottrell v Cottrell* (1866) LR 2 Eq 330; *Basnett v Moxon* (1875) LR 20 Eq 182; *Re Whitham, Whitham v Davies* (1901) 84 LT 585. As to the overriding effect of a sale under court order see the Law of Property Act 1925 s 2(1)(iv); and REAL PROPERTY vol 39(2) (Reissue) PARA 251. The order does not, however, affect either the legal or the equitable interests in the land of persons who are neither parties nor bound by the proceedings in which the order is made: *Craddock v Piper* (1844) 14 Sim 310; *Grey Coat Hospital Governors v Westminster Improvement Comrs* (1857) 1 De G & J 531; *Freeland v Pearson* (1869) LR 7 Eq 246. As to the proper persons to transfer see PARA 274 post. As to the court's power to make a vesting order in favour of a purchaser or to appoint a person to transfer see PARA 266 post. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

5 CPR Sch 1 RSC Ord 31 r 1.

6 Law of Property Act 1925 s 204 (reproducing the Conveyancing Act 1881 s 70 (repealed)); see *Re Hall Dare's Contract* (1882) 21 ChD 41, CA; *Mostyn v Mostyn* [1893] 3 Ch 376, CA; *Re Bridgett and Hayes' Contract* [1928] Ch 163. This provision does not confer a good title on the purchaser as against perfect strangers to the proceedings who were not in the contemplation of the court when it made the order for sale: *Jones v Barnett* [1899] 1 Ch 611; affd [1900] 1 Ch 370, CA. As to misrepresentation on sales by court order see *Mahomed Kala Mea v Harperink* (1908) 25 TLR 180, PC; and PARA 83 note 4 ante.

7 *Annesley v Ashurst* (1734) 3 P Wms 282.

8 See the County Courts Act 1984 s 23, Sch 2 (as amended); and COURTS.

9 See the County Courts Act 1984 s 24 (as amended); and COURTS.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### 133-136 Sales under Orders of the Court

CPR Sch 1 RSC Ord 31 revoked. As to the court's power to order sale and the appointment of conveyancing counsel see now CPR 40.15-40.19 (added by SI 2000/221). See also *Practice Direction--Court's Powers in Relation to Land, Conveyancing Counsel of the Court* (2000) PD 40D.

### 133 Power to order sale of land

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(7) SALES UNDER ORDERS OF THE COURT/134. Manner of carrying out the sale.

### **134. Manner of carrying out the sale.**

The sale may be made either in court or out of court. Where an order is made, whether in court or in chambers, directing land to be sold<sup>1</sup>, the court appoints the party or person who is to have the conduct of the sale<sup>2</sup>, and may permit him to sell the land in such manner as he thinks fit, or may direct that the land be sold in such manner as the court directs, either by the order or subsequently<sup>3</sup>, for the best price that can be obtained<sup>4</sup>. The court usually directs that the sale be effected out of court.

The court may direct that the land be sold by contract conditional on the approval of the court (in which case the sale is effected in court<sup>5</sup>), or by private treaty, or by public auction<sup>6</sup> (although an auction may be dispensed with if a reserve price can be agreed between the parties), by tender or in some other manner<sup>7</sup>. The court may fix a reserve or minimum price<sup>8</sup>, may direct the payment of the purchase money into court or to trustees or other persons<sup>9</sup>, and may give directions for settling the particulars and conditions of sale<sup>10</sup>, for obtaining evidence of the value of the property<sup>11</sup> and for requiring the abstract of title to be referred to conveyancing counsel of the court<sup>12</sup> or some other conveyancing counsel for his opinion on it and to settle the particulars and conditions of sale<sup>13</sup>.

1 So far as applicable, CPR Sch 1 RSC Ord 31 rr 2, 3, apply also, with the necessary modifications, in relation to the mortgage, exchange or partition of any land under an order of the court: CPR Sch 1 RSC Ord 31 r 4. CPR Sch 1 RSC Ord 31 r 1 (power to order sale of land) also applies to applications for ancillary relief in family proceedings: see the Family Proceedings Rules 1991, SI 1991/1247, r 2.64(3). As to the CPR see PARA 133 note 1 ante.

2 CPR Sch 1 RSC Ord 31 r 2(2)(a). See further PARA 135 post.

3 The court's directions as to the manner of sale may be contained in the order for sale; if they are not, directions may be given in proceedings under CPR Sch 1 RSC Ord 44 in chambers under the order. The order for sale may contain directions for the conduct of the proceedings under the order: see CPR Sch 1 RSC Ord 44 r 3. It is not necessary to issue a summons to proceed; as the procedure is now as directed by the court, which will fix a day for the further attendance of the parties: CPR Sch 1 RSC Ord 44 r 3(1)(f).

4 CPR Sch 1 RSC Ord 31 r 2(1).

5 Thus all the steps are taken under the court's directions. Where the action is begun in a district registry, it is in the judge's discretion whether the sale will take place there or in his chambers: *Macdonald v Foster* (1877) 6 ChD 193, CA.

6 In the case of a sale by auction the court may give directions as to any security to be given by the auctioneer, and as to his remuneration: CPR Sch 1 RSC Ord 31 r 2(2)(g). As to the scales of remuneration usually allowed to estate agents and auctioneers see *Practice Direction* [1983] 1 All ER 160, [1983] 1 WLR 86.

7 CPR Sch 1 RSC Ord 31 r 2(2)(b). The court has power to direct a sale before a master in chambers: *Waterhouse v Wilkinson* (1864) 1 Hem & M 636; *Barlow v Osborne* (1858) 6 HL Cas 556 at 571, 572; *Pemberton v Barnes* (1872) LR 13 Eq 349.

8 CPR Sch 1 RSC Ord 31 r 2(2)(c).

9 CPR Sch 1 RSC Ord 31 r 2(2)(d). In this case the result of the sale must be certified by the solicitor for the party or person having the conduct of the sale or, if the sale is by public auction, by the auctioneer, and the

court may require the certificate to be verified by the witness statement or affidavit by the solicitor or auctioneer, as the case may be: CPR Sch 1 RSC Ord 31 r 3(1). The solicitor must file the certificate and any witness statement or affidavit in the office of the court dealing with the proceedings: CPR Sch 1 RSC Ord 31 r 3(2).

10 CPR Sch 1 RSC Ord 31 r 2(2)(e). As to conditions of sale see PARA 76 et seq ante.

11 CPR Sch 1 RSC Ord 31 r 2(2)(f).

12 As to conveyancing counsel of the court see PARA 136 post. As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 post.

13 CPR Sch 1 RSC Ord 31 r 2(2)(h). See further PARA 136 post.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### 133-136 Sales under Orders of the Court

CPR Sch 1 RSC Ord 31 revoked. As to the court's power to order sale and the appointment of conveyancing counsel see now CPR 40.15-40.19 (added by SI 2000/221). See also *Practice Direction--Court's Powers in Relation to Land, Conveyancing Counsel of the Court* (2000) PD 40D.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(7) SALES UNDER ORDERS OF THE COURT/135. Conduct of the sale.

#### 135. Conduct of the sale.

The conduct of a sale of land under an order of the court is usually committed to the plaintiff or other person having the carriage of the order<sup>1</sup>, but the court has a discretion in the matter and will give the conduct of the sale to another party or person if such a course is shown to be for the benefit of those interested<sup>2</sup>. As between the vendor and the purchaser, the solicitor for the party or person having the conduct of the sale is deemed to be the agent of all parties to the action<sup>3</sup>.

Leave to bid may be given to the parties to the action by the order for sale<sup>4</sup>, or may be applied for by summons in chambers, but none of the parties ought to bid without leave<sup>5</sup>. If all obtain leave to bid, the conduct of the sale may be given to an independent solicitor<sup>6</sup>.

On a sale by auction the highest bona fide bidder at or above the reserve price, if any, is to be declared to be the purchaser<sup>7</sup>. The same rule applies to a sale by private tender<sup>8</sup>.

The result of the sale is stated in the form of a master's order<sup>9</sup>, which has effect as a final order disposing of the proceedings in which it is made<sup>10</sup>, subject to such directions as the master thinks fit to include in the order as to the further consideration of the proceedings either at a public or private hearing<sup>11</sup>, and the order has immediate binding effect on the parties<sup>12</sup>, although it is subject to appeal in the usual way<sup>13</sup>.

1 *Dale v Hamilton* (1853) 10 Hare App I, vii. This is so notwithstanding that, as between the parties, the plaintiff, if there were no action, would not be entitled to interfere with the sale: *Dale v Hamilton* supra. As to the court's power to direct who is to have the conduct of the sale see CPR Sch 1 RSC Ord 31 r 2(2)(a). As to the CPR see PARA 133 note 1 ante.

2 *Dixon v Pyner* (1850) 7 Hare 331; *Hewitt v Nanson* (1858) 28 LJ Ch 49; *Knott v Cottee (No 4)* (1859) 27 Beav 33; *Re Gardner, Gardner v Beaumont* (1879) 48 LJ Ch 644; *Davies v Wright* (1886) 32 ChD 220. The Court of Appeal will not interfere with the exercise of the discretion: *Re Love, Hill v Spurgeon* (1885) 29 ChD 348, CA. Where in an administration claim an order is made for the sale of any property vested in executors, administrators or trustees, unless otherwise ordered, the conduct of the sale will be given to those executors, administrators or trustees: CPR Sch 1 RSC Ord 85 r 6; and see EXECUTORS AND ADMINISTRATORS; TRUSTS vol 48 (2007 Reissue) PARA 1075.

3 *Dalby v Pullen* (1830) 1 Russ & M 296. So also is the conveyancing counsel of the court (as to whom see PARA 136 post): *Re Banister, Broad v Munton* (1879) 12 ChD 131, CA. As to the relations of solicitor and client generally see LEGAL PROFESSIONS vol 66 (2009) PARA 763 et seq. See also PARA 3 ante.

4 As to a form of order see 1 Seton's Form of Decrees, Judgments and Orders (7th Edn, 1912) 324.

5 *Elworthy v Billing* (1841) 10 Sim 98. However, if a party bids without leave the purchase may be allowed to stand: *Elworthy v Billing* supra. The person having the conduct of the sale will not be allowed to bid: *Sidny v Ranger* (1841) 12 Sim 118; see 2 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 893. A person to whom leave to bid has been given is under no greater obligations as to disclosure and good faith than those imposed on ordinary purchasers (see PARA 62 ante): *Coaks v Boswell* (1886) 11 App Cas 232, HL.

6 *Dean v Wilson* (1878) 10 ChD 136.

7 See the Sale of Land by Auction Act 1867 s 7 (as amended). See also *Guest v Smythe* (1870) 5 Ch App 551; *Delves v Delves* (1875) LR 20 Eq 77; *Union Bank of London v Munster* (1887) 37 ChD 51; *Re Bartlett, Newman v Hook* (1880) 16 ChD 561. The practice of opening biddings was abolished by the Sale of Land by Auction Act 1867 s 7 (as amended), except in case of fraud or improper conduct bordering on fraud in the management of the sale. A mistake in chambers as regards the reserve price, or a misstatement by the auctioneer affecting the value of the property, is a reason for opening the bidding or refusing to sell to a bidder: see *Re Longvale Brick and Lime Works Ltd* [1917] 1 IR 321, Ir CA; *Re Joseph Clayton Ltd, Smith v The Company* [1920] 1 Ch 257. Where an interested party bought in a sale improperly, resale was ordered and, on no higher bid being made, the original purchaser was held to his purchase: *Re Dumbell, ex p Hughes, ex p Lyon* (1802) 6 Ves 617.

8 *Munster and Leinster Bank v Munster Motor Co* [1922] 1 IR 15.

9 CPR Sch 1 RSC Ord 44 r 11(1).

10 CPR Sch 1 RSC Ord 44 r 11(2). Strictly speaking, it is only at this stage that the contract is concluded with the purchaser: see *Ex p Minor* (1805) 11 Ves 559; and see also *Twigg v Fifield* (1807) 13 Ves 517 at 518. When these cases were decided the decisive time was when the master's certificate became absolute, but the procedure has now changed, and the master's order takes the place of the master's certificate. On a subsale at a profit before the master's certificate became absolute, the profit went to the parties to the original action (*Hodder v Ruffin* (1830) Taml 341), but on a subsale afterwards the original purchaser took the profit (*Dewell v Tuffnell* (1855) 1 K & J 324).

11 CPR Sch 1 RSC Ord 44 r 11(3).

12 CPR Sch 1 RSC Ord 44 r 11(4). Copies of the order must be served on such of the parties as the master directs: CPR Sch 1 RSC Ord 44 r 11(4).

13 See CPR Sch 1 RSC Ord 44 r 12. The appeal lies to the judge in chambers under CPR Sch 1 RSC Ord 58 r 1 (which now extends to appeals from orders of Chancery masters, the former practice of seeking an adjournment to the judge having been discontinued). As to appeals under CPR Sch 1 RSC Ord 58 r 1 see EXECUTORS AND ADMINISTRATORS.

## UPDATE

### 1-136 The Contract and Preliminary Matters

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### **133-136 Sales under Orders of the Court**

CPR Sch 1 RSC Ord 31 revoked. As to the court's power to order sale and the appointment of conveyancing counsel see now CPR 40.15-40.19 (added by SI 2000/221). See also *Practice Direction--Court's Powers in Relation to Land, Conveyancing Counsel of the Court* (2000) PD 40D.

### **135 Conduct of the sale**

TEXT AND NOTES--CPR Sch 1 RSC Ord 44 r 12, Ord 58 revoked: SI 2000/221.

TEXT AND NOTE 11--Words 'either at a public or private hearing' omitted: CPR Sch 1 RSC Ord 44 r 11(3) (amended by SI 1999/1008).

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/1. THE CONTRACT AND PRELIMINARY MATTERS/(7) SALES UNDER ORDERS OF THE COURT/136. Preparation of conditions and references to conveyancing counsel.

### **136. Preparation of conditions and references to conveyancing counsel.**

The solicitor for the party having the conduct of the sale prepares the particulars, which must be entitled in the cause or matter and must state that the sale is made under an order of the court, and that solicitor also prepares the abstract of title.

The court may require the abstract to be referred to conveyancing counsel of the court<sup>1</sup> or some other conveyancing counsel for his opinion on it and to settle the particulars and conditions of sale<sup>2</sup>; and may itself refer to conveyancing counsel of the court (1) any matter relating to the investigation of the title to any property with a view to its sale<sup>3</sup>; (2) any other matter relating to the settlement of a draft of the transfer<sup>4</sup>; and (3) any other matter it may think fit<sup>5</sup>. The court may act upon his opinion in the matter referred<sup>6</sup>. Any party may object to the opinion, whereupon the point in dispute is decided by the judge, either in chambers or in court as he thinks fit<sup>7</sup>.

1 The conveyancing counsel of the court are conveyancing counsel in actual practice who have practised as such for not less than ten years: Supreme Court Act 1981 s 131(1). They are appointed by the Lord Chancellor, and are not more than six nor less than three in number: s 131(2). An order referring any matter to conveyancing counsel of the court must be recorded in the books of the court, and a copy of the order must be sent by the court to counsel, and constitutes sufficient authority for him to proceed with the reference: CPR Sch 1 RSC Ord 31 r 8. As to the CPR see PARA 133 note 1 ante. As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 post.

2 CPR Sch 1 RSC Ord 31 r 2(2)(h). It is unclear whether the master has a right to refer a matter to conveyancing counsel: *Flower v Walker* (1826) 1 Russ 408.

3 CPR Sch 1 RSC Ord 31 r 5(a). The power is expressed to extend also to the investigation of the title to any property with a view to the investment of money in its purchase or on its mortgage: see CPR Sch 1 RSC Ord 31 r 5(a).

4 CPR Sch 1 RSC Ord 31 r 5(b). The power is expressed to extend also to the settlement of a draft mortgage or settlement or other instrument: see CPR Sch 1 RSC Ord 31 r 5(b). As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

5 CPR Sch 1 RSC Ord 31 r 5(c).

6 CPR Sch 1 RSC Ord 31 r 5.

7 CPR Sch 1 RSC Ord 31 r 6.

## **UPDATE**

### **1-136 The Contract and Preliminary Matters**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### **133-136 Sales under Orders of the Court**

CPR Sch 1 RSC Ord 31 revoked. As to the court's power to order sale and the appointment of conveyancing counsel see now CPR 40.15-40.19 (added by SI 2000/221). See also *Practice Direction--Court's Powers in Relation to Land, Conveyancing Counsel of the Court* (2000) PD 40D.

### **136 Preparation of conditions and references to conveyancing counsel**

NOTE 1--Supreme Court Act 1981 s 131 (now Senior Courts Act 1981 s 131) amended: Constitutional Reform Act 2005 Sch 4 para 145.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/(i) Vendor's Obligation and Length of Title/137. Obligation as to title.

## **2. RIGHTS AND DUTIES PRIOR TO COMPLETION**

### **(1) PROOF AND INVESTIGATION OF TITLE**

#### **(i) Vendor's Obligation and Length of Title**

##### **137. Obligation as to title.**

In the absence of any express stipulation as to title<sup>1</sup>, a contract for the sale of land<sup>2</sup> implies an agreement on the part of the vendor to make a good, that is, a marketable<sup>3</sup> title to the property sold<sup>4</sup>. He discharges this obligation when he shows that he, or some person or persons whose concurrence he can require, can transfer to the purchaser the whole legal and equitable interest in the land sold<sup>5</sup>.

In general, it is sufficient if the vendor shows that he has a good title by the time fixed for completion<sup>6</sup>, but, if it appears before that time that he has not a title, and is not in a position to obtain one, the purchaser may repudiate the contract<sup>7</sup>.

1 A contract containing no stipulation restricting the title to be shown by the vendor is called 'an open contract', but the vendor usually protects himself by inserting special stipulations as to title (see PARA 76 et seq ante), and also by reserving a right of rescission (see PARA 104 ante).

2 As to the formation of the contract see PARAS 23-40 ante.

3 A marketable title is one which at all times and under all circumstances can be forced on an unwilling purchaser: *Pyrke v Waddingham* (1853) 10 Hare 1 at 8. See also *Maconchy v Clayton* [1898] 1 IR 291 (Ir CA); *Darvell v Basildon Development Corp* (1969) 211 Estates Gazette 33; *MEPC Ltd v Christian-Edwards* [1981] AC 205, [1979] 3 All ER 752, HL; *Barclays Bank plc v Weeks Legg & Dean (a firm)* [1999] QB 309 at 324, [1998] 3 All ER 213 at 221, CA, per Millett LJ; and SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 878. Even if it is not marketable a title may be a good holding title (ie one which presents no probability of an adverse claim being made) and can usually be sold under suitable conditions as to title. Such a title can be registered under the Land Registration Act 1925 as absolute: see s 13 proviso (c); para 336 note 1 post; and LAND REGISTRATION. As to the vendor's obligations see Harpum 'Selling Without Title: A Vendor's Duty of Disclosure?' (1992) 108 LQR 280; Harpum 'Exclusion Clauses and Contracts for the Sale of Land' [1992] CLJ 263. See also Rudden 'The Terminology of Title' (1964) 80 LQR 63.

4 In *Ogilvie v Foljambe* (1817) 3 Mer 53 at 64, the purchaser's right to a good title was spoken of as 'a right not growing out of the agreement between the parties, but which is given by law'. In this view the right is collateral to and not an implied term of the contract (*Ellis v Rogers* (1885) 29 ChD 661 at 670, CA) but usually it is treated as an implied term of the contract (*Flureau v Thornhill* (1776) 2 Wm Bl 1078; *Duke of St Alban's v Shore* (1789) 1 Hy Bl 270 at 280; *Doe d Gray v Stanion* (1836) 1 M & W 695 at 701). See also PARA 336 post. The vendor's obligation is the same whether the question arises in an action for specific performance or in one for damages for breach of contract (see *Purvis v Rayer* (1821) 9 Price 488; *Souter v Drake* (1834) 5 B & Ad 992 at 1002) or for a declaration that a good title has been shown under a vendor and purchaser summons (see *MEPC Ltd v Christian-Edwards* [1981] AC 205, [1979] 3 All ER 752, HL). The vendor's obligation to show a title may, however, be excluded by the circumstances as well as by special stipulation (see *Turner v Turner* (1852) 2 De GM & G 28 at 46; *Richardson v Eyton* (1852) 2 De GM & G 79) and if the vendor's interest is limited and the contract shows this, he need not make a title except to the limited interest (*Worthington v Warrington* (1848) 5 CB 635). See also *Re Judge and Sheridan's Contract* (1907) 96 LT 451; and *Hall v Betty* (1842) 4 Man & G 410.

5 See *Lord Braybroke v Inskip* (1803) 8 Ves 417 at 436; *Re Stirrup's Contract* [1961] 1 All ER 805, [1961] 1 WLR 449. It is sufficient if the vendor shows that he has a good equitable title and power to get in the legal estate: *Camberwell and South London Building Society v Holloway* (1879) 13 ChD 754 at 763. The getting in of the legal estate is a matter of conveyance, and not of title: *Avarne v Brown* (1844) 14 Sim 303; *Kitchen v Palmer* (1877) 46 LJ Ch 611; and see *Smith v Ellis* (1850) 14 Jur 682; *Elliot and H Elliot (Builders) Ltd v Pierson* [1948] Ch 452, [1948] 1 All ER 939. However, good equitable title is not sufficient if it is uncertain in whom the legal estate is vested: *Wynne v Griffith* (1826) 1 Russ 283. Where an appointment of trustees is necessary, the execution of such an appointment is a matter of title and not of conveyance: *Re Priestley's Contract* [1947] Ch 469, [1947] 1 All ER 716. Under the system of conveyancing established by the Law of Property Act 1925, equitable interests are, as far as possible, kept off the title, and the title in its simplest form consists only of instruments conveying a legal estate: see s 10; and PARA 146 post. As to the duty of a vendor of registered land who is not himself registered as proprietor see LAND REGISTRATION. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

6 *Boehm v Wood* (1820) 1 Jac & W 419 at 421.

7 *Forrer v Nash* (1865) 35 Beav 167. Cf *Re Head's Trustees and Macdonald* (1890) 45 ChD 310, CA; *Re Cooke and Holland's Contract* (1898) 78 LT 106; *Re Bryant and Barningham's Contract* (1890) 44 ChD 218, CA; *Re Baker and Selmon's Contract* [1907] 1 Ch 238; *Re Hucklesby and Atkinson's Contract* (1910) 102 LT 214; *Pips (Leisure Productions) Ltd v Walton* (1982) 43 P & CR 415; *Pinekerry Ltd v Kenneth Needs (Contractors) Ltd* (1992) 64 P & CR 245, CA. See also PARAS 239-240 post.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### 137 Obligation as to title

NOTES 3, 5--Land Registration Act 1925 replaced by Land Registration Act 2002: see LAND REGISTRATION.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/(i) Vendor's Obligation and Length of Title/138. Abstract of title.

#### 138. Abstract of title.

In the case of unregistered land, the vendor shows his title by delivering an abstract of it to the purchaser and makes his title by proving the contents of the abstract by proper evidence<sup>1</sup>.

In the case of registered land, subject to any stipulation to the contrary, the vendor must furnish such abstracts and evidence in respect of rights and interests appurtenant to the land as to which the register is not conclusive and matters excepted from the effect of registration as a purchaser is entitled to on a sale of unregistered land, but he cannot be required to furnish any other abstract or written evidence of title<sup>2</sup>. Where the title to the land is registered with an absolute title or good leasehold title, no abstract of title can normally be required<sup>3</sup>. However, where the land is registered with a possessory or qualified title, the title prior to registration must be abstracted and inquired into in the same way as the title to unregistered land, because neither the initial registration nor any disposition of the registered land affects rights adverse to those of the proprietor registered with the possessory title, or rights excepted from the effect of the qualified registration, as the case may be<sup>4</sup>.

1 *Parr v Lovegrove* (1858) 4 Drew 170 at 181; *Games v Bonnor* (1884) 54 LJ Ch 517, CA. Cf *Mullings v Trinder* (1870) LR 10 Eq 449 at 455. See also *Horne v Wingfield* (1841) 3 Scott NR 340; and Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 406. As to the nature of the abstract of title see PARAS 141-149 post. Under the Standard Conditions of Sale (3rd Edn), the vendor's obligation is to produce to the purchaser (without cost to the purchaser) the original of every relevant document, or an abstract, epitome or copy with an original marking by a solicitor of examination either against the original or against an examined abstract or against an examined copy: condition 4.2.3. As to the Standard Conditions of Sale see PARA 1 note 9 ante. The statements in the text should be read subject to this contractual provision. The law relating to abstracts of title developed before the use of the photocopier, so, the expertise to produce a traditional abstract is unlikely to be found in the office of a present day conveyancer. Therefore, a recently prepared abstract is unlikely to exist and an epitome of title accompanied by certified photocopies is regarded as an acceptable alternative. As to conveyancers see PARA 3 ante.

2 See LAND REGISTRATION vol 26 (2004 Reissue) PARAS 823-824.

3 See LAND REGISTRATION vol 26 (2004 Reissue) PARA 834 et seq (effect of first registration with absolute title), 838-839 (effect of first registration with absolute leasehold title or good leasehold title), 934 et seq (effect of disposition where absolute freehold title is registered and effect of disposition where title is absolute leasehold title or good leasehold title). It is normal, however, for the conditions of sale to require the vendor to produce office copies of entries in the register and of any filed plans and documents: see the Standard Conditions of Sale (3rd Edn), condition 4.2.1; the Land Registration Act 1925 s 110(1), (2) (s 110(1) as amended); and LAND REGISTRATION. See also *Wood v Berkeley Homes (Sussex) Ltd* (1992) 64 P & CR 311, CA (where it was held that the Land Registration Act 1925 s 110(3) does not invalidate a condition requiring the vendor to produce office copies of documents stipulated in s 110(1) (as amended)). As to the effect of s 110(5) on conditions of sale see *Urban Manor Ltd v Sadiq* [1997] 1 WLR 1016, [1997] 12 LS Gaz R 22 CA; and LAND REGISTRATION. As to overriding interests see *Williams and Glyn's Bank Ltd v Boland* [1981] AC 487, [1980] 2 All ER 408, HL; and LAND REGISTRATION vol 26 (2004 Reissue) PARAS 863 et seq, 960 et seq. The property is sold subject to incumbrances discoverable by inspection of the property before the contract: see the Standard Conditions of Sale (3rd Edn), condition 3.1.2; and PARA 55 ante. This condition may be wide enough to cover virtually all rights protected as overriding interests under the Land Registration Act 1925 s 70(1)(g): see LAND REGISTRATION vol 26 (2004 Reissue) PARAS 866, 962.



4 See LAND REGISTRATION vol 26 (2004 Reissue) PARAS 859 et seq (effect of registration), 934 et seq (effect of disposition).

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### 138 Abstract of title

NOTES 2-4--Land Registration Act 1925 replaced by Land Registration Act 2002: see LAND REGISTRATION.

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### 139. Length of title.

On a sale of unregistered land<sup>1</sup> the vendor must deduce a title for a period of at least 15 years preceding the sale<sup>2</sup> unless a contrary intention is expressed in the contract<sup>3</sup>. Fifteen years is only the minimum period, and in fact the title must be deduced for 15 years and so much longer as it is necessary to go back in order to arrive at a proper root of title<sup>4</sup>. Except in so far as a contrary intention is expressed in the contract, a longer title than 15 years can be required in cases where before 1926 a title longer than 40 years<sup>5</sup> could have been required, and as to such cases the former practice still prevails<sup>6</sup>. Thus in the case of a reversionary interest the title must be carried back at least as far as the instrument creating it<sup>7</sup>; and on the sale of a term of years more than 15 years old, the lease creating the term must be produced<sup>8</sup>, unless the vendor has protected himself by the contract against production being required<sup>9</sup>. It is sufficient both in the case of reversions, terms of years and rentcharges if the intermediate title is carried back for 15 years only<sup>10</sup> from the date at which title has to be shown; and it seems that the same rule applies in other cases where the title to the property depends on an original grant, such as property held under grant from the Crown: the original grant must be shown, but the subsequent title only for the last 15 years<sup>11</sup>.

1 'Land' includes land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments; also a manor, an advowson, and a rent and other incorporeal hereditaments, and an easement, right, privilege or benefit in, over, or derived from land: Law of Property Act 1925 s 205(1)(ix) (definition amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4). As to registered land see PARA 138 ante.

2 See the Law of Property Act 1925 s 44(1) (amended by the Law of Property Act 1969 s 23). 'Sale' includes an extinguishment of manorial incidents, but in other respects means a sale properly so called: Law of Property Act 1925 s 205(xxiv). Section 44(1) (as amended) applies to contracts of sale of land made after 1 January 1970: see the Law of Property Act 1969 ss 23, 31(2). When freehold land was formerly copyhold, the purchaser cannot call for the title to make any enfranchisement (see the Law of Property Act 1925 s 44(6)); nor, in the absence of a contrary intention expressed in the contract, can he call for the title of any person to enter into a compensation agreement (see s 44(7)). As to land formerly copyhold see CUSTOM AND USAGE; REAL PROPERTY.

3 See *ibid* s 44(11). As to titles for less than the statutory period see PARA 90 ante; and as to the landlord's title where leasehold land is enfranchised under the Leasehold Reform Act 1967 see the Leasehold Reform (Enfranchisement and Extension) Regulations 1967, SI 1967/1879, reg 2, Schedule Pt I para 3; and LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1440.

4 *Re Cox and Neve's Contract* [1891] 2 Ch 109 at 118. As to the meaning of 'root of title' see PARA 142 post. So, under the former law, it might be necessary to carry back the title beyond 40 or 60 years: see *Phillips v Caldwell* (1868) LR 4 QB 159.

5 See note 2 *supra*.

6 See the Law of Property Act 1925 s 44(1), (11) (s 44(1) as amended); and LAND REGISTRATION.

7 See 1 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 293. In order to avoid any question as to possession of the land when the interest falls into possession, it must be shown that it is being enjoyed at the time of the sale by the owner of the immediate estate. A reversionary interest, other than a reversion on a lease for years, will now be equitable: see REAL PROPERTY vol 39(2) (Reissue) PARA 162 et seq.

8 *Frend v Buckley* (1870) LR 5 QB 213, Ex Ch. Where a contract for the assignment of a lease entitled a purchaser to a title commencing from the freeholder, but provided that no title should be called for prior to the lease, the purchaser was entitled to investigate dealings with an agreement in pursuance of which the lease had been granted: *Rhodes v Ibbetson* (1853) 4 De GM & G 787.

9 As to conditions protecting vendors against liability to produce see PARA 98 ante.

10 *Williams v Spargo* [1893] WN 100. There are now statutory restrictions on the creation of rentcharges, and many existing rentcharges are by statute terminable: see the Rentcharges Act 1977 ss 2 (as amended), 3; and RENTCHARGES AND ANNUITIES.

11 See *Pickering v Lord Sherbourne* (1838) 1 Craw & D 254; Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 367; and 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 119.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/(i) Vendor's Obligation and Length of Title/140. Title to leaseholds.

#### 140. Title to leaseholds.

On a sale of leaseholds it is sufficient if the vendor produces the lease under which he holds and shows a title to it for at least 15 years, or for the whole existence of the lease if less than 15 years old<sup>1</sup>. Unless a contrary intention is expressed in the contract<sup>2</sup>, the purchaser<sup>3</sup> under a contract to sell a term of years, whether derived out of freehold or leasehold land<sup>4</sup>, may not call for the title to the freehold<sup>5</sup>, or, if the lease is derived out of a leasehold estate, the title to the leasehold reversion<sup>6</sup>. Before 1926 such a purchaser, although precluded from calling for the title to the freehold or leasehold reversion, was nevertheless affected with constructive notice of that title<sup>7</sup>. In the case of contracts made after 1925 he is not affected with notice of any matter or thing of which he might have had notice if he had contracted that the title to the freehold or the leasehold reversion should be furnished<sup>8</sup>, but it seems that, in the case of

unregistered land, this protection does not extend to matters registered under the Land Charges Act 1972 or the Local Land Charges Act 1975 of which the purchaser is by statute deemed to have actual notice<sup>9</sup>, and that the protection has no application to registered land where the matter is an overriding interest or a minor interest protected on the register<sup>10</sup>.

1 See PARA 139 ante.

2 See the Law of Property Act 1925 s 44(11); and PARA 139 note 6 ante. On the grant of a new lease exceeding 21 years (ie a lease which will be registrable under the Land Registration Act 1925), the vendor must deduce a title which will enable the purchaser to register the lease with an absolute title: see the Standard Conditions of Sale (3rd Edn), condition 8.2.4; and PARA 98 note 4 ante. As to the Standard Conditions of Sale see PARA 1 note 9 ante.

3 For the meaning of 'purchaser' see PARA 55 note 16 ante.

4 For the meaning of 'land' see PARA 139 note 1 ante.

5 Law of Property Act 1925 s 44(2). A purchaser may, however, raise by other means an objection that the title to the freehold is bad and will thus have the usual right of a litigant to production of the relevant documents: see *Jones v Watts* (1890) 43 ChD 574, CA. As to conditions excluding the right to raise such objections see PARA 98 ante. In the case of land held on lease or underlease, the purchaser must assume that the lease or underlease was duly granted: see the Law of Property Act 1925 s 45(2), (3). A similar restriction as to title is imposed in the case of a contract to grant a lease: see s 44(2), (4); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 89. As to the description in particulars of sale see PARA 79 ante. A contract to sell a lease is not satisfied by the grant of an underlease: see PARA 59 ante.

6 Ibid s 44(3). Dicta in *Drive Yourself Hire Co (London) Ltd v Strutt* [1954] 1 QB 250 at 263, [1953] 2 All ER 1475 at 1485, CA, per Romer LJ, suggesting that an assignee of a sub-lease is entitled to see the head lease, and citing *Gosling v Woolf* [1893] 1 QB 39, appear to have been uttered per incuriam; cf *Gosling v Woolf* supra as reported in 68 LT 89, 41 WR 106. From these reports it appears that *Gosling v Woolf* supra, was a case of a grant, not an assignment of an underlease. See also *Becker v Partridge* [1966] 2 QB 155 at 169, [1966] 2 All ER 266 at 268, CA, per Dankwerts LJ.

7 Cf *Patman v Harland* (1881) 17 ChD 353.

8 See the Law of Property Act 1925 s 44(5).

9 See ibid s 198(1) (as amended); and LAND CHARGES vol 26 (2004 Reissue) PARA 616. See also PARAS 20-21, 55 ante.

10 See *White v Bijou Mansions Ltd* [1937] Ch 610 at 619-622, [1937] 3 All ER 269 at 272-275 (affd on other points [1938] Ch 351, [1938] 1 All ER 546, CA); the *Report of the Committee on Land Charges* (Cmd 9825) (1956) PARAS 34-42; and EQUITY vol 16(2) (Reissue) PARA 583; LAND REGISTRATION vol 26 (2004 Reissue) PARA 838; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 89. A purchaser of unregistered land cannot investigate the superior title so he may be unable to discover the names of previous estate owners against whom charges are registered under the Land Charges Act 1972; and a purchaser so prejudiced is not entitled to compensation under the Law of Property Act 1969 s 25: see s 25(9), (10); and LAND CHARGES vol 26 (2004 Reissue) PARA 617. A purchaser of registered land may investigate the superior title, since the register is open to public inspection: see the Land Registration Act 1925 s 112 (as substituted); the Land Registration (Open Register) Rules 1991, SI 1992/122, rr 4, 4A (as added), 4B (as added); and LAND REGISTRATION.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### 140 Title to leaseholds

NOTE 5--The Law of Property Act 1925 s 44(2), (4) does not apply to a contract to grant a term of years if the grant will be an event within the Land Registration Act 2002 s 4(1) (events which trigger compulsory first registration of title: see LAND REGISTRATION): Law of Property Act 1925 s 44(4A) (added by Land Registration Act 2002 Sch 11 para 2(2)).

NOTE 8--Law of Property Act 1925 s 44(5) amended: 2002 Act Sch 11 para 2(3).

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## **(ii) The Abstract of Title**

### **141. Contents of abstract.**

The abstract of title<sup>1</sup> is a summary of the documents by which any dispositions of the property have been made during the period for which title has to be shown, and of all the facts, such as births, marriages, deaths or other matters affecting the devolution of the title during the same period<sup>2</sup>. As far as possible it is (as regards transactions dated since 1925) confined to dispositions of a legal estate<sup>3</sup>.

1 As to the need for an abstract of title with respect to both unregistered and registered land see PARA 138 ante.

2 As to the vendor's obligation to deliver an abstract see PARA 100 ante; and *Re Priestley and Davidson's Contract* (1892) 31 LR Ir 122.

3 See the Law of Property Act 1925 s 10; and PARA 146 note 9 post.

## **UPDATE**

### **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/(ii) The Abstract of Title/142. Root of title.

### **142. Root of title.**

The abstract must commence with a good root of title, that is, in the absence of contrary stipulation, with some document purporting to deal with the entire legal and equitable estate in the property sold, not depending for its validity upon any previous instrument, and containing nothing to throw any suspicion on the title of the disposing parties<sup>1</sup>. The best root of title is a conveyance in fee on sale or a freehold mortgage<sup>2</sup>. A general devise by will is insufficient, as

there is nothing to show that the property passed by it<sup>3</sup>, and there must, in any event, be proof of the testator's seisin at his death<sup>4</sup>. A specific devise to a beneficiary for his own use and benefit was a proper root of title<sup>5</sup>, but, since 1925, such a devise operates only in equity<sup>6</sup>, and the root of title is the assent by the executor or executors to such a specific devise, which is a good root of title provided no doubt is cast upon its operation by recital or otherwise<sup>7</sup>. An instrument the effect of which depends on some earlier instrument is prima facie an insufficient root of title, and it is necessary to go back to the earlier instrument; for example, a title depending on an appointment under a power or on a disentailing deed must be carried back to the instrument creating the power or the entail<sup>8</sup>. If, however, it has been expressly agreed that an instrument of appointment or disentailing deed is to form the root of title, the purchaser<sup>9</sup> cannot require the production, nor an abstract, of the document creating the power, nor, it seems, the entail, unless the documents as abstracted throw doubt on the earlier title, in which event the purchaser can resist specific performance unless the vendor abstracts the earlier document so far as is necessary to remove the doubt, and produces it<sup>10</sup>.

A voluntary conveyance is a proper root of title under an open contract<sup>11</sup>, but if it is made a root of a good title at a shorter period than 15 years the conditions must clearly state its nature<sup>12</sup>.

1 See *Re Cox and Neve's Contract* [1891] 2 Ch 109 at 118. The statement that the document must purport to deal with the entire legal and equitable interest appears to be correct, notwithstanding that equitable interests are in general kept off the title. Where intended, the legal estate carries the equivalent equitable interest: see 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 47 note (u); *Vandervell v IRC* [1967] 2 AC 291 at 311, [1967] 1 All ER 1 at 7, HL, per Lord Upjohn. A conveyance which overreaches equitable interests will form a good root: see LAND REGISTRATION. As to overreaching see the Law of Property Act 1925 s 10; and PARA 146 note 9 post. As to the need for an abstract of title with respect to both unregistered and registered land see PARA 138 ante.

2 Since 1925 a freehold mortgage must take effect either by demise for a term of years or by legal charge, and in either case does not in itself dispose of the legal fee simple (see *ibid* ss 85, 87; and MORTGAGE vol 77 (2010) PARA 101 et seq), but where the mortgagor's title to the fee simple is recited, a mortgage deed is in practice accepted as a good root of title (see 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 124).

3 Where it is intended that the title is to commence with a general devise, this is always expressly stipulated, and the purchaser is required to assume the seisin of the testator at the time of his death; otherwise the title must commence with the conveyance to the testator or, if there is no conveyance, with evidence of his seisin at the date of his death. A statutory declaration showing collection of rents on his behalf for more than 20 years is not sufficient: *Re Gilbert and Foster's Contract* (1935) 52 TLR 4.

4 As to a condition requiring seisin to be assumed see *Re Banister, Broad v Munton* (1879) 12 ChD 131, CA (only matters of which vendor knows nothing).

5 This was so, it is believed, in practice, but a specific devise had been said not to be an eligible root of title (see *Parr v Lovegrove* (1858) 4 Drew 170 at 177), and it was better to specify the nature of the document in the contract (see 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 127).

6 See the Law of Property (Amendment) Act 1924 s 9, Sch 9 para 3.

7 See the Administration of Estates Act 1925 s 36(7). As to doubt being cast upon such an assent see *Re Duce and Boots Cash Chemists (Southern) Ltd's Contract* [1937] Ch 642, [1937] 3 All ER 788.

8 See eg *Re Copelin's Contract* [1937] 4 All ER 447, 54 TLR 130; *Re W & R Holmes and Cosmopolitan Press Ltd's Contract* [1944] Ch 53, [1943] 2 All ER 716. If the deed has been lost, and the possession of the land has been for a considerable time in accordance with the estates purporting to have been created under it, the loss of the deed and the absence of evidence of its contents are not objections to the title: see *Coussmaker v Sewell* (1791), cited in Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 366; *Nouaille v Greenwood* (1822) Turn & R 26.

9 For the meaning of 'purchaser' see PARA 55 note 16 ante.

10 See the Law of Property Act 1925 s 45(1), (10), (11). This exclusion of documents dated before the commencement of title does not extend to: (1) any power of attorney under which an abstracted document is

executed (s 45(1) proviso (i)); or (2) any document creating or disposing of an interest, power or obligation which is not shown to have ceased or expired, and subject to which any part of the property is disposed of by an abstracted document (s 45(1) proviso (ii)); or (3) any document creating any limitation or trust by reference to which any part of the property is disposed of by an abstracted document (s 45(1) proviso (iii)); and where a lease is made under a power contained in a settlement, will, Act of Parliament or other instrument, any preliminary contract for or relating to the lease does not, for the purpose of the deduction of title to a purchaser, form part of the title, or evidence of the title, to the lease (s 44(9)).

11 *Re Marsh and Earl Granville* (1883) 24 ChD 11 at 24, CA, per Cotton LJ. A voluntary deed as a link in the title is not a defect in title, since a purchaser gets a good title under it (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 653 et seq) provided the purchaser has no notice of its being impeachable. As to transactions at an undervalue and preferences where an individual is adjudged bankrupt see the Insolvency Act 1986 ss 339-342 (as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 653 et seq. As to transactions at undervalue and preferences where a company goes into liquidation or an administration order is made see ss 238-241 (as amended); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 843 et seq. As to the protection of purchasers for value without notice in a case where a transaction is impeachable on the ground of undue influence see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 839 et seq. As to the meaning of 'open contract' see PARA 76 ante.

12 *Re Marsh and Earl Granville* (1883) 24 ChD 11, CA. See also *Noyes v Paterson* [1894] 3 Ch 267; and PARA 83 ante.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/(ii) The Abstract of Title/143. Possessory title.

### 143. Possessory title.

A title gained by the operation of the Limitation Act 1980<sup>1</sup> is a good title and will be forced by the court on an unwilling purchaser<sup>2</sup>. However, proof that a vendor and those through whom he claims have had independent possession of an estate for 12 years<sup>3</sup> will not be sufficient to establish a saleable title without evidence to show the state of the title at the time the possession commenced. If the contract for sale is an open one possession for 15 years must be shown<sup>4</sup>. A condition of sale may be so drawn as to enable a vendor to force the purchaser to accept a title resting on mere possession<sup>5</sup>.

1 As to the application of the Limitation Act 1980 to registered land see LAND REGISTRATION vol 26 (2004 Reissue) PARAS 1021, 1023. As to limitation periods generally see LIMITATION PERIODS.

2 See eg *Games v Bonnor* (1884) 54 LJ Ch 517, CA; *Re Cussons Ltd* (1904) 73 LJ Ch 296; and see LIMITATION PERIODS vol 68 (2008) PARA 1097.

3 This is the normal period of limitation for an action to recover land: see the Limitation Act 1980 ss 15(1), 17; and cf LIMITATION PERIODS vol 68 (2008) PARAS 1025 et seq, 1095 et seq.

4 *Jacobs v Revell* [1900] 2 Ch 858. See also *Cottrell v Watkins* (1839) 1 Beav 361; *Moulton v Edmonds* (1859) 1 De GF & J 246 at 250; *Re Nisbet and Potts' Contract* [1906] 1 Ch 386, CA; *Re Atkinson and Horsell's Contract* [1912] 2 Ch 1 at 11, CA. Cf the Limitation Act 1980 s 28(4) (see LIMITATION PERIODS vol 68 (2008) PARAS 1171-1172), by which 30 years is the maximum to which the period of limitation for the recovery of land can be

extended on the ground that a person entitled to recover has been under a disability. As to the disposition of land registered with a possessory title see PARA 138 ante.

5 See *Rosenberg v Cook* (1881) 8 QBD 162, CA, where the sale of the land to the vendor by a railway company had been ultra vires; and cf *George Wimpey & Co Ltd v Sohn* [1967] Ch 487, [1966] 1 All ER 232, CA, where the vendor's contractual obligation to show 20 years' undisputed possession was not satisfied by a 12 year possessory title.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

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#### 144. Documents to be abstracted.

The document forming the root of title and all subsequent documents dealing with the legal estate (except documents relating to estates which will be overreached by the conveyance to the purchaser<sup>1</sup>), and also any prior documents or parts of them incorporated by reference in documents subsequent to the commencement of title<sup>2</sup>, should be abstracted in chief in date order<sup>3</sup>, including mortgages, even if satisfied<sup>4</sup>, but not leases which have expired<sup>5</sup>. Similarly, all material facts, such as births, deaths, grants of probate or administration, or other matters, should be stated in date order<sup>6</sup>.

1 See the Law of Property Act 1925 s 10, under which documents relating to interests or powers which will be overreached by the conveyance to the purchaser need not be abstracted. Usually these will be equitable interests and powers, but it is possible for legal interests and powers to be overreached, such as a puisne mortgage and the powers incident to it: see MORTGAGE vol 77 (2010) PARA 260. As to the powers of a legal mortgagee in right of his estate being legal powers see s 1(7); and POWERS; and as to the concealment of incumbrances see s 183; and PARA 149 post. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

2 See PARAS 142 note 10 ante, 150 note 7 post.

3 This should be done notwithstanding their subsequent recital in the abstracted documents: *Re Ebsworth and Tidy's Contract* (1889) 42 ChD 23 at 34, CA; *Re Stamford, Spalding and Boston Banking Co and Knight's Contract* [1900] 1 Ch 287.

4 See *Heath v Crealock* (1874) 10 Ch App 22; cf *Gray v Fowler* (1873) LR 8 Exch 249 at 265.

5 As to abstracting leases see *Bond v Bassett* (1917) 87 LJ Ch 160, where counterparts of leases and drafts of conveyances were admitted in wartime. As to a document of union of two building societies see *Re Fryer and Hampson's Contract* [1929] WN 45, CA; and FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1937.

6 In the case of deaths before 1926, it was necessary to abstract receipts and other documents showing that death duties payable within 12 years of the date had been discharged. In the case of deaths after 1925 a purchaser of a legal estate took free from a charge in respect of death duties unless the charge was registered as a land charge, and the same is now true of a charge in respect of what is now inheritance tax: see INHERITANCE TAXATION vol 24 (Reissue) PARA 683; LAND CHARGES vol 26 (2004 Reissue) PARA 634; LAND REGISTRATION vol 26 (2004 Reissue) PARA 938.

It would be desirable also to abstract certificates of search under the Land Charges Act 1972 which would avoid, or mitigate, the problem of land charges which are undiscoverable because the charge is registered against the name of an estate owner whose name is not disclosed by the abstract: see LAND CHARGES vol 26 (2004 Reissue) PARA 617. In practice, however, search certificates are seldom abstracted (though copies are often kept with the documents of title).

## **UPDATE**

### **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/(ii) The Abstract of Title/145. Equitable interests.

#### **145. Equitable interests.**

The abstracting<sup>1</sup> of documents relating to equitable interests depends on two considerations: (1) the effect of the conveyance of the legal estate to a purchaser for value without notice; and (2) the effect of the conveyance in overreaching the equitable interests. A purchaser taking the legal estate without notice of any equitable interests affecting it is protected<sup>2</sup>. Thus equitable interests are immaterial to his title and in practice are frequently suppressed. This is always the case where the legal estate has been vested in trustees who are intended to stand as absolute owners as regards third persons. In such cases the conveyance to the trustees is framed so as to keep the trusts off the title, and this object would be defeated if dealings with the beneficial interest were disclosed<sup>3</sup>.

<sup>1</sup> As to the need for an abstract of title with respect to both unregistered and registered land see PARA 138 ante.

<sup>2</sup> As to the circumstances in which a purchaser will be protected see *Jared v Clements* [1902] 2 Ch 399 (affd [1903] 1 Ch 428, CA); and EQUITY vol 16(2) (Reissue) PARA 570.

<sup>3</sup> See *Re Harman and Uxbridge and Rickmansworth Rly Co* (1883) 24 ChD 720; *Carritt v Real and Personal Advance Co* (1889) 42 ChD 263 at 272; *Re Soden and Alexander's Contract* [1918] 2 Ch 258. In *Re Blaiberg and Abrahams* [1899] 2 Ch 340, trusts of mortgage money were inadvertently disclosed, but the inconvenience resulting from such a disclosure has been removed by the Law of Property Act 1925 s 113 (see MORTGAGE vol 77 (2010) PARA 373). See also *Re Pope's Contract* [1911] 2 Ch 442.

## **UPDATE**

### **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.



Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/(ii) The Abstract of Title/146. Overreaching of equitable interests.

### 146. Overreaching of equitable interests.

The ordinary effect of a conveyance<sup>1</sup> on a sale by trustees is that it overreaches the equitable interests<sup>2</sup> of the persons beneficially entitled, and in certain cases by statute the conveyance overreaches equitable interests prior to the trust of land<sup>3</sup>. A similar effect is given to a conveyance made by a tenant for life under his statutory powers, and such a conveyance may also overreach certain legal estates<sup>4</sup>. An overreaching effect is also given to a conveyance of the legal estate<sup>5</sup> in certain other cases<sup>6</sup>. Where an equitable interest or a legal estate will be so overreached, a purchaser<sup>7</sup> is not concerned with it, and where title is shown to a legal estate in land, it is not necessary or proper to include in the abstract<sup>8</sup> an instrument relating only to interests or powers which will be overreached by the conveyance of the estate to which title is being shown<sup>9</sup>.

1 'Conveyance' includes a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or of an interest therein by any instrument, except a will: Law of Property Act 1925 s 205(ii). As to the disposition or assurance of registered or unregistered land by transfer see PARA 262 note 2 post.

2 'Equitable interests' mean all the other interests and charges in or over land: *ibid* s 205(x); definition amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(2), Sch 4.

3 See the Law of Property Act 1925 s 2(2) (amended by the Law of Property (Amendment) Act 1926 s 7, Schedule; and the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 4(2)); and REAL PROPERTY vol 39(2) (Reissue) PARA 249. 'Trust of land' means any trust of property which consists of or includes land: Trusts of Land and Appointment of Trustees Act 1996 s 1(1)(a); Interpretation Act 1978 s 5, Sch 1 (definition added by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 16).

4 See the Settled Land Act 1925 s 72; and REAL PROPERTY vol 39(2) (Reissue) PARA 787; SETTLEMENTS vol 42 (Reissue) PARA 874.

5 'Legal estates' mean the estates, interests and charges, in or over land (subsisting or created at law) which are by the Law of Property Act 1925 authorised to subsist or to be created as legal estates: s 205(x).

6 See *ibid* s 2(1) (as amended); paras 282-283 post; and REAL PROPERTY vol 39(2) (Reissue) PARA 247 et seq.

7 For the meaning of 'purchaser' see PARA 55 note 16 ante.

8 As to the need for an abstract of title with respect to both unregistered and registered land see PARA 138 ante.

9 See the Law of Property Act 1925 s 10(1). Solicitors who omit to include in an abstract framed in accordance with Pt I (ss 1-39) (as amended) instruments which under s 10 need not be included, or who include any such instrument, are protected from liability: s 10(2). This protection extends to a licensed conveyancer (see the Administration of Justice Act 1985 s 11(2); and LEGAL PROFESSIONS vol 66 (2009) PARAS 1319, 1411) and recognised bodies (see s 39(1); and LEGAL PROFESSIONS vol 66 (2009) PARA 1392): see s 34(2)(a); and LEGAL PROFESSIONS vol 66 (2009) PARA 1411. As to licensed conveyancers see LEGAL PROFESSIONS vol 66 (2009) PARA 1319 et seq. See also PARA 3 ante. It has always been the practice not to abstract the equitable interests where title is being made under a trust. The Law of Property Act 1925 s 10 makes the practice apply generally in cases where equitable interests (and, it would seem, legal estates) are overreached by a conveyance of the legal estate in question. It introduces no new rule and may be regarded as declaratory only, but it emphasises the principle that title is in general to be made by showing devolutions and dispositions of the legal estate.

The term 'overreaching' ordinarily refers to the effect of conveyances under trusts of land and under the statutory powers of a tenant for life (see s 2(1), (2) (as amended); the Settled Land Act 1925 s 72; and PARA 144 note 1 ante) where the interest which is overreached is not destroyed in value, but is transferred to the proceeds of sale (see REAL PROPERTY vol 39(2) (Reissue) PARA 247 et seq). However, overreaching can apply to transactions where no capital money arises: *State Bank of India v Sood* [1997] Ch 276, [1997] 1 All ER 169, CA. The term is sometimes used to denote the effect of a conveyance by a mortgagee under his statutory power of sale. In that case, however, the mortgagor's estate is transferred to the purchaser and the estates of

subsequent legal incumbrancers are extinguished (see the Law of Property Act 1925 ss 88(1), 89(1); and MORTGAGE vol 77 (2010) PARAS 447, 448), and whether they are covered by s 10(1) or not, it would be contrary to conveyancing practice to abstract them. The term 'overreaching' may also be applied to the leasing powers of a mortgagor and mortgagee in possession: see s 99 (amended by the Agricultural Tenancies Act 1995 s 31(1)-(3)). See also Harpum 'Overreaching Trustees' Powers and the Reform of the 1925 Legislation' [1990] 49 CLJ 277.

Dealings with the equity of redemption, even though they take the form of a legal mortgage, are no part of the mortgagee's title, and do not require to be abstracted, even if he is aware of them. A legal mortgage which may be defeated for want of registration is not within the Law of Property Act 1925 s 10(1), since, until the conveyance is completed, the mortgage may be registered (see MORTGAGE vol 77 (2010) PARA 101 et seq). The purchaser can, however, protect himself against registration within the 15 days preceding completion by obtaining a certificate of search: see LAND CHARGES vol 26 (2004 Reissue) PARA 701.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/(ii) The Abstract of Title/147. Abstracting equitable interests.

#### 147. Abstracting equitable interests.

Nothing in the general statutory provisions relating to the subsistence of legal estates<sup>1</sup> and equitable interest<sup>2</sup> affects the liability of any person to disclose an equitable interest or power<sup>3</sup> which will not be overreached by the conveyance<sup>4</sup> of the legal estate to which title is being shown, or to furnish an abstract of any instrument creating or affecting it<sup>5</sup>. However, the abstract not uncommonly omits documents creating equitable charges which have been paid off or, if still subsisting, are intended to be paid off on completion<sup>6</sup>.

Subject to the foregoing rule for excluding documents from the abstract<sup>7</sup> in certain cases, any documents which affect equitable interests should be abstracted, and this is necessary where it is proposed to make a title with the concurrence of the owner or owners of equitable interests<sup>8</sup>. In the case of a subsale, the sub-purchaser is entitled to an abstract of the original contract<sup>9</sup>.

1 For the meaning of 'legal estates' see PARA 146 note 5 ante.

2 See under the Law of Property Act 1925 Pt I (ss 1-39) (as amended): see s 10(1). For the meaning of 'equitable interest' see PARA 146 note 2 ante.

3 'Equitable powers' means all the powers in or over land under which equitable interests or powers only can be transferred or created: *ibid* s 205(xi).

4 For the meaning of 'conveyance' see PARA 146 note 1 ante.

5 Law of Property Act 1925 s 10(1).

6 In *Drummond v Tracy* (1860) John 608 at 612, where a letter creating an equitable charge which was intended to be paid off out of the purchase money had been suppressed, Wood V-C thought that this course was wrong, and would not have been justifiable even if the charge had no longer been subsisting. In the practice of conveyancers, however, this strict rule is not observed: see 1 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 298; 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels

Real (4th Edn, 1936) 129. As to the concealment of incumbrances see the Law of Property Act 1925 s 183; and PARA 149 post. As to conveyancers see PARA 3 ante.

7 As to the need for an abstract of title with respect to both unregistered and registered land see PARA 138 ante.

8 As a rule, a purchaser is not bound to accept a conveyance made with the concurrence of the owners of equitable interests (see *ibid* s 42(1) (as amended); and PARA 272 post), but the rule is not absolute (see s 43(1); and PARA 129 ante) and to take a conveyance in this form may be the convenient course (see PARA 273 post). Generally any documents which, although primarily affecting equitable interests, may affect the legal estate should be abstracted: see *Palmer v Locke* (1881) 18 ChD 381, CA; 1 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 299.

9 *Re Hucklesby and Atkinson's Contract* (1910) 102 LT 214.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/(ii) The Abstract of Title/148. Form of abstract.

#### 148. Form of abstract.

The abstract<sup>1</sup> should set out the contents of every material part of the abstracted documents according to their tenor, and not give merely a statement of their effect.

The parcels as described in the first abstracted deed should be set out verbatim; in the abstracts of subsequent deeds which repeat the same description they are referred to as the abstracted premises. Tracings of plans indorsed on or annexed to the deeds, and referred to in the description of the parcels, should accompany the abstract, and where, as is usually the case, the plans form an essential part of the description of the premises, tracings of them can be insisted on<sup>2</sup>.

1 As to the need for an abstract of title with respect to both unregistered and registered land see PARA 138 ante.

2 See 1 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 300. As to the right of a purchaser to have the premises conveyed by reference to a plan see *Re Sansom and Narbeth's Contract* [1910] 1 Ch 741; *Re Sharman and Meade's Contract* [1936] Ch 755, [1936] 2 All ER 1547; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 229. See also BOUNDARIES vol 4(1) (2002 Reissue) PARA 904. The tracings should show the compass marks (an essential matter which is frequently overlooked) and should be indorsed with the date of the conveyance to which they belong. Where there are several plans and the land has been altered by division, the plans should be detachable for comparison, especially if the direction of the compass marks has been altered.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/(ii) The Abstract of Title/149. Fraudulent concealment of documents and falsification of pedigrees.

#### **149. Fraudulent concealment of documents and falsification of pedigrees.**

Any person disposing of property or any interest in it for money or money's worth to a purchaser<sup>1</sup>, or the solicitor<sup>2</sup> or other agent of any such person, who, with intent to defraud (1) conceals from the purchaser any instrument or incumbrance<sup>3</sup> material to the title<sup>4</sup>; or (2) falsifies any pedigree upon which the title may depend in order to induce the purchaser to accept the title offered or produced<sup>5</sup>, is guilty of an offence<sup>6</sup> punishable by fine or imprisonment for a term not exceeding two years or both<sup>7</sup>.

Any such person or his solicitor or agent is also liable to an action for damages<sup>8</sup> by the purchaser<sup>9</sup> or persons deriving title under him for any loss sustained by reason of (a) the concealment of the instrument of incumbrance<sup>10</sup>; or (b) any claim made by a person under such pedigree whose right was concealed by the falsification<sup>11</sup>.

1 For the meaning of 'purchaser' see PARA 55 note 16 ante.

2 See PARA 3 ante.

3 'Incumbrance' includes a legal or equitable mortgage and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum: Law of Property Act 1925 s 205(vii).

4 Ibid s 183(1)(a). Suppression of a document is an offence: see the Theft Act 1968 s 20(1); and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(1) (2006 Reissue) PARA 317.

5 Law of Property Act 1925 s 183(1)(b).

6 No prosecution is to be commenced without the leave of the Attorney General (ibid s 183(4)) and before leave is granted the person intended to be prosecuted must be given such notice of the application for leave as the Attorney General may direct (s 183(5)). As to the power of the Solicitor General to act in his place see CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 529.

7 Ibid s 183(1).

8 Where the property or any interest in it is recovered from the purchaser or the persons deriving title under him, regard must be had, in estimating damages, to any expenditure by him or them in improvements of any land: ibid s 183(3). For the meaning of 'land' see PARA 139 note 1 ante. The purchaser must prove an intent to defraud: *District Bank Ltd v Luigi Grill Ltd* [1943] Ch 78, [1943] 1 All ER 136.

9 As to the purchaser's remedies generally see PARA 56 ante.

10 Law of Property Act 1925 s 183(2)(a). It seems that this does not apply to concealment of an incumbrance prior to the commencement of title: see *Smith v Robinson* (1879) 13 ChD 148.

11 Law of Property Act 1925 s 183(2)(b).

#### **UPDATE**

#### **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### **149 Fraudulent concealment of documents and falsification of pedigrees**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/(iii) Proof of Title/A. IN GENERAL/150. Proof of title shown by abstract.

### **(iii) Proof of Title**

#### **A. IN GENERAL**

#### **150. Proof of title shown by abstract.**

The vendor must prove by production of the proper evidence the title shown by the abstract<sup>1</sup>. In the absence of a contrary stipulation<sup>2</sup>, recitals, statements and descriptions of facts, matters and parties contained in deeds, instruments<sup>3</sup>, Acts of Parliament or statutory declarations, 20 years old at the date of the contract, are taken to be sufficient evidence (except so far as they can be proved to be inaccurate) of the truth of such facts, matters and descriptions<sup>4</sup>. Unless the contrary appears, the purchaser<sup>5</sup> must assume that recitals contained in the abstracted instruments of any deed, will or other document forming part of the title prior to the time prescribed by law or stipulated for the commencement of title<sup>6</sup> are correct and give all the material contents of the deed, will or other document so recited, and that every document so recited was duly executed and perfected, if and as required, by fine, recovery, acknowledgment, enrolment or otherwise<sup>7</sup>.

1 As to how far the evidence must be such as would be admissible in litigation see PARA 161 note 8 post. 'I do not entirely assent to the proposition that a vendor is in every case bound to supply evidence which would be admissible in an action for ejectment': *Halkett v Earl of Dudley* [1907] 1 Ch 590 at 604 per Parker J. As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 ante.

2 In the Law of Property Act 1925 s 45(10) proviso: see s 45(6).

3 Copies of entries in court rolls of admittances or surrenders seem not to be instruments, since they are records of operative acts and are not operative themselves; consequently recitals in such documents are, it is believed, not within this statutory rule. As to the admissibility of court rolls as evidence see generally CUSTOM AND USAGE; and as to the proof of entries in rolls see PARA 158 post.

4 Law of Property Act 1925 s 45(6). The decision of Malins V-C in *Bolton v London School Board* (1878) 7 ChD 766, that a recital of a seisin in fee contained in a deed 20 years old at the time of the contract was held to be evidence of such seisin, except so far as it was proved inaccurate by the purchaser, and that no prior title could be required, is not good law: see *Re Wallis and Grout's Contract* [1906] 2 Ch 206 at 210 per Swinfen Eady J. As to the effect of conditions making recitals and statements in deeds evidence see *Goold v White* (1854) Kay 683; *Drysdale v Mace* (1854) 5 De GM & G 103; *Poppleton v Buchanan* (1858) 4 CBNS 20. As to the effect of a recital of an earlier deed as evidence of that deed see *Gillett v Abbott* (1838) 7 Ad & El 783; *Bringloe v Goodson* (1839) 5 Bing NC 738. See further *Shrinivasdas Bavri v Meherbai* (1916) 33 TLR 106, PC (sale of land in India). As to a recital that the grantee is entitled in equity see *Re Chafer and Randall's Contract* [1916] 2 Ch 8, CA (declaration

of trust); *Re Soden and Alexander's Contract* [1918] 2 Ch 258 (not sufficient as notice of trust); *Re Balen and Shepherd's Contract* [1924] 2 Ch 365 (recital differing from state of affairs appearing on face of abstract).

5 For the meaning of 'purchaser' see PARA 55 note 16 ante.

6 As to root of title see PARA 142 ante.

7 Law of Property Act 1925 s 45(1). This does not preclude the calling for documents prior to the commencement of title which are incorporated by reference in a document subsequent to such commencement: see s 45(1) proviso (iii) (in effect overruling *Re Earl of Arran and Knowlesden and Creer's Contract* [1912] 2 Ch 141). See also PARA 142 note 11 ante; and TC Williams 'The Abstracting and Production of Documents Incorporated by Reference in a Title Deed' (1919) 63 Sol Jo 406.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/(iii) Proof of Title/A. IN GENERAL/151. Proof of abstracted documents.

#### 151. Proof of abstracted documents.

Abstracted documents<sup>1</sup> are proved by production of the originals. If a document comes from the proper custody<sup>2</sup>, and there is no cause for suspecting its authenticity, proof of due execution is not required, and it is presumed to have been executed or signed as appears on its face<sup>3</sup>.

1 As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 ante.

2 I.e. if it comes from a place where it might reasonably be expected to be found: see *Croughton v Blake* (1843) 12 M & W 205 at 208; *Doe d Jacobs v Phillips* (1845) 8 QB 158; *Bishop of Meath v Marquis of Winchester* (1836) 3 Scott 561 at 577, HL.

3 Such proof probably cannot be required (even if the document is less than 20 years old) unless there are circumstances of suspicion: see 1 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 309. As to the presumption in favour of documents not less than 20 years old see *Re Airey, Airey v Stapleton* [1897] 1 Ch 164 (presumption applies to deeds etc more than 30 years old); and CIVIL PROCEDURE vol 11 (2009) PARA 874. The purchaser is entitled to an explanation of any erasures which cause suspicion: *Hobson v Bell* (1839) 8 LJ Ch 241.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/(iii) Proof of Title/A. IN GENERAL/152. Lost documents of title.

### **152. Lost documents of title.**

When a deed or other document of title has been lost or destroyed, secondary evidence of its contents and execution may be given upon proof of loss or destruction, and, if that evidence is clear and cogent, a purchaser cannot object to a title depending on the lost document<sup>1</sup>.

<sup>1</sup> *Re Halifax Commercial Banking Co Ltd and Wood* (1898) 79 LT 536 at 539-540, CA. See also *Bryant v Busk* (1827) 4 Russ 1; *Hart v Hart* (1841) 1 Hare 1; *Moulton v Edmonds* (1859) 1 De GF & J 246 at 251. If due execution is proved its due stamping will be presumed (see *Hart v Hart* supra; and CIVIL PROCEDURE vol 11 (2009) PARA 961) but this presumption is rebutted by evidence showing that at a particular time the document was unstamped (*Marine Investment Co v Haviside* (1872) LR 5 HL 624). As to what constitutes secondary evidence of a document see generally CIVIL PROCEDURE vol 11 (2009) PARA 878 et seq. As to the proof of instruments creating powers of attorney see AGENCY vol 1 (2008) PARA 17.

## **UPDATE**

### **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/(iii) Proof of Title/A. IN GENERAL/153. Proof of enrolment and acknowledgment of deeds.

### **153. Proof of enrolment and acknowledgment of deeds.**

The enrolment of deeds is now required only in a limited number of cases<sup>1</sup>. Where deeds are required to be enrolled, enrolment is usually proved by memorandum of enrolment indorsed on the deed by the proper officer without proof of his signature or official character<sup>2</sup>.

The registration of assurances which were formerly required to be registered in a Yorkshire deeds registry is proved by the certificate indorsed on the assurance by the registrar<sup>3</sup>.

<sup>1</sup> As to conveyances which must or may be enrolled see PARA 316 post.

<sup>2</sup> *Doe d Williams v Lloyd* (1840) 1 Man & G 671. The necessity for the acknowledgment of deeds by married women was abolished as regards deeds executed after 1925 by the Law of Property Act 1925 s 167(1) (repealed): see REAL PROPERTY vol 39(2) (Reissue) PARA 230. In the case of acknowledgment of deeds made after 1882 and before 1926, the memorandum indorsed on the deed was sufficient: Conveyancing Act 1882 s 7(2) (repealed).

<sup>3</sup> See the Law of Property Act 1969 s 22(1). The Yorkshire deeds registries are now all closed (the last, at Beverley, closing on 31 March 1976) and all the governing legislation has been repealed: see the Law of Property Act 1969 ss 16-19 (as amended), 21, 22.

**UPDATE****137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/(iii) Proof of Title/B. PROOF OF PARTICULAR MATTERS/154. Seisin.

**B. PROOF OF PARTICULAR MATTERS****154. Seisin.**

Seisin<sup>1</sup> may be proved by showing acts of ownership done with respect to the land, such as the grant of a lease under which possession has been taken by the lessee and rent paid<sup>2</sup>. However, mere possession, although sufficient to give a prima facie title in ejectment, raises no presumption of seisin in fee simple as between vendor and purchaser<sup>3</sup>.

<sup>1</sup> As to seisin see REAL PROPERTY vol 39(2) (Reissue) PARA 167.

<sup>2</sup> *Clarkson v Woodhouse* (1782) 5 Term Rep 412n (affd (1786) 3 Doug KB 194, Ex Ch); *Welcome v Upton* (1840) 6 M & W 536. Cf *Foljambe v Smith's Tadcaster Brewery Co* (1904) 73 LJ Ch 722; and CIVIL PROCEDURE vol 11 (2009) PARA 924. As to admissions to the legal estate see *Doe d Daniel v Coulthred* (1837) 7 Ad & El 235 at 239.

<sup>3</sup> See *Clibborn v Horan* [1921] 1 IR 93; *Re Gilbert and Foster's Contract* (1935) 52 TLR 4. However, conditions often provide that in the case of a death more than 12 years before contract it is to be presumed that the deceased died seised in fee simple free from incumbrances unless the contrary is shown. As to possessory title see PARA 143 ante.

**UPDATE****137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/(iii) Proof of Title/B. PROOF OF PARTICULAR MATTERS/155. Enfranchisement award.

**155. Enfranchisement award.**



Awards of enfranchisement of copyholds and voluntary enfranchisements (which must have been made before 1 January 1926<sup>1</sup>) are proved by production of the award or deed of enfranchisement respectively. Confirmation or execution by the minister is conclusive evidence of all necessary formalities having been complied with<sup>2</sup>.

1 The date when all copyhold land was enfranchised: see the Law of Property Act 1922 s 128 (repealed); and REAL PROPERTY VOL 39(2) (Reissue) PARAS 31 (abolition of copyhold tenure), 34-35 (extinguishment of manorial incidents). In the absence of agreement to the contrary, a purchaser is not entitled to call for the title of the person entering into a compensation agreement: Law of Property Act 1925 s 44(7); and see PARA 139 note 2 ante.

2 Copyhold Act 1894 s 61(1) (repealed). An award under the Copyhold Act 1852 may be proved by a copy under the seal of the commissioners for the purposes of that Act: see s 49 (repealed). Copies of awards were required to be sent, sealed or stamped, to the lord of the manor and entered on the court rolls: see the Copyhold Act 1887 s 22 (repealed).

## **UPDATE**

### **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/(iii) Proof of Title/B. PROOF OF PARTICULAR MATTERS/156. Inclosure awards.

#### **156. Inclosure awards.**

An award made under the Inclosure Act 1845 may be proved by a copy or extract signed by the proper officer of the county council, purporting to be a true copy<sup>1</sup>.

1 See the Inclosure Act 1845 s 146 (amended by the Statute Law Revision Act 1891); the Local Government Act 1972 s 251(1), Sch 29 para 4(1)(b); and COMMONS vol 13 (2009) PARAS 422, 489. The award is not conclusive as to the title of the allottee: *Jacomb v Turner* [1892] 1 QB 47.

## **UPDATE**

### **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/(iii) Proof of Title/B. PROOF OF PARTICULAR MATTERS/157. Bankruptcy proceedings.

## **157. Bankruptcy proceedings.**

A copy of the London Gazette containing a notice of a bankruptcy order is conclusive evidence both of the making and of the date of the order<sup>1</sup>.

<sup>1</sup> See the Insolvency Rules 1986, SI 1986/1925, r 12.20(2); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 787. As to the registration of a bankruptcy order see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 419.

### **UPDATE**

## **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

## **157 Bankruptcy proceedings**

TEXT AND NOTES--SI 1986/1925 r 12.20 revoked: SI 2010/686.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/(iii) Proof of Title/B. PROOF OF PARTICULAR MATTERS/158. Manorial court rolls.

## **158. Manorial court rolls.**

Entries in the court rolls of a manor may be proved by production of the rolls<sup>1</sup>, or by examined copies<sup>2</sup>, or by copies purporting to be signed and certified by the steward<sup>3</sup>.

The last-mentioned copies are usually accepted without proof of the steward's handwriting in the absence of any cause for suspecting their genuineness<sup>4</sup>.

<sup>1</sup> *Doe d Bennington v Hall* (1812) 16 East 208. However, since deposit of the copies originally delivered by the steward might create an equitable charge (*Whitbread v Jordan* (1835) 1 Y & C Ex 303), their absence must be accounted for if the court rolls themselves are offered as evidence. As to inspection of the rolls see generally CUSTOM AND USAGE.

<sup>2</sup> *Doe d Cawthorn v Mee* (1833) 4 B & Ad 617; *Doe d Burrows v Freeman* (1844) 12 M & W 844. See also *Breeze v Hawker* (1844) 14 Sim 350; and CIVIL PROCEDURE vol 11 (2009) PARA 925.

<sup>3</sup> See the Evidence Act 1851 s 14.

<sup>4</sup> 1 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 307-308. As to the admissibility of court rolls in evidence see generally CUSTOM AND USAGE.

### **UPDATE**

## **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/(iii) Proof of Title/B. PROOF OF PARTICULAR MATTERS/159. Litigious documents.

### **159. Litigious documents.**

Court documents are not exhibited since official copies of such documents prove themselves<sup>1</sup>.

<sup>1</sup> See CPR Pt 32 *Practice Direction--Written Evidence* (1999) PD 32 para 13.2. As to the CPR see PARA 133 note 1 ante.

## **UPDATE**

### **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/(iii) Proof of Title/B. PROOF OF PARTICULAR MATTERS/160. Wills, probate and letters of administration.

### **160. Wills, probate and letters of administration.**

In the case of deaths after 1925 all enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real apply to the real estate of the deceased<sup>1</sup>, and consequently the rule that a probate while unrevoked is conclusive evidence of the validity and contents of a will and that letters of administration are similarly conclusive of the intestacy of the deceased applies in relation to real estate as well as personal estate<sup>2</sup>. Probates and letters of administration and copies of them purporting to be sealed with the official seal will be received in evidence in all parts of the United Kingdom without further proof<sup>3</sup>.

<sup>1</sup> See the Administration of Estates Act 1925 s 2(1); and EXECUTORS AND ADMINISTRATORS.

<sup>2</sup> See EXECUTORS AND ADMINISTRATORS.

<sup>3</sup> See EXECUTORS AND ADMINISTRATORS. In showing title to a legal estate a will is usually abstracted only as to the appointment of executors; but where there has been an assent vesting property in trustees upon the trust contained in the will, it may be necessary to show that the property was left upon trust: see generally EXECUTORS AND ADMINISTRATORS.

## **UPDATE**

## 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/(iii) Proof of Title/B. PROOF OF PARTICULAR MATTERS/161. Births, marriages, deaths and other matters of pedigree.

### 161. Births, marriages, deaths and other matters of pedigree.

A birth<sup>1</sup> is sufficiently proved either by a certificate of baptism<sup>2</sup> or by a certificate of birth<sup>3</sup>. A marriage is sufficiently proved by a certified extract from the parochial or general register<sup>4</sup>; and a death is sufficiently proved by a certificate of burial or by a certificate of death<sup>5</sup>. Evidence is not usually required of the identity of the parties named in such certificates; when it is required, it can be given by means of a statutory declaration. Matters of pedigree may also be proved by the statutory declarations of living members of the family or of other persons acquainted with the family<sup>6</sup>. In the absence of formal evidence or of a statutory declaration, the proof of facts may sometimes be assisted by presumption<sup>7</sup>; it has been held, for example, that persons who have lived together as husband and wife were legally married (the presumption being supported by proof of general repute<sup>8</sup>), and a purchaser must in suitable cases be satisfied with such proof<sup>9</sup>.

1 As to evidence of pedigree generally see CIVIL PROCEDURE vol 11 (2009) PARAS 830, 950 and 956; and as to evidence which has been tendered in peerage claims see eg the *Shrewsbury Peerage Case* (1858) 7 HL Cas 1; and PEERAGES AND DIGNITIES vol 79 (2008) PARA 855 et seq.

2 Ie a certified copy of the entry in the appropriate parochial register: see CIVIL PROCEDURE vol 11 (2009) PARAS 909-910; ECCLESIASTICAL LAW.

3 Ie a certified extract from the general register of births: see CIVIL PROCEDURE vol 11 (2009) PARA 1094; REGISTRATION CONCERNING THE INDIVIDUAL. A birth certificate is not alone sufficient evidence of the parents' marriage expressly or impliedly stated in it: *Re Stollery, Weir v Treasury Solicitor* [1926] Ch 284, CA.

4 As to the appropriate parochial register see CIVIL PROCEDURE vol 11 (2009) PARAS 909-910; ECCLESIASTICAL LAW; and as to the general register and the particulars in it see CIVIL PROCEDURE vol 11 (2009) PARA 1094; REGISTRATION CONCERNING THE INDIVIDUAL. As to non-parochial registers as evidence see 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 189; and CIVIL PROCEDURE vol 11 (2009) PARA 911 et seq.

5 Ie a certified extract from the general register of deaths: see CIVIL PROCEDURE vol 11 (2009) PARA 1094; REGISTRATION CONCERNING THE INDIVIDUAL. In practice, probate or letters of administration are usually accepted as sufficient evidence of death. As to parochial registers of burials as evidence see CIVIL PROCEDURE vol 11 (2009) PARAS 909-910; and as to the presumption of death see CIVIL PROCEDURE vol 11 (2009) PARAS 1100, 1101; EXECUTORS AND ADMINISTRATORS.

6 All statutory declarations should be made by a person having the requisite knowledge and, where possible, by an independent person: see *Hobson v Bell* (1839) 2 Beav 17 at 22; *Nott v Riccard* (1856) 22 Beav 307; and 1 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 329. As to the presumption of legitimacy see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 94 et seq; as to procedures for the judicial determination of parentage see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 120 et seq; and as to proof of adoption see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 383.

7 As to a presumption that a woman is past child-bearing see *Browne v Warnock* (1880) 7 LR 1r 3; *Re Westminster Bank Ltd's Declaration of Trust* [1963] 2 All ER 400n, [1963] 1 WLR 820; the Perpetuities and Accumulations Act 1964 s 2(1)(a); and CIVIL PROCEDURE vol 11 (2009) PARA 1102.

8 See *Re Shephard, George v Thyer* [1904] 1 Ch 456; *Re Haynes, Haynes v Carter* (1906) 94 LT 431. The presumption applies even where registration of marriage is compulsory: *Re Taplin, Watson v Tate* [1937] 3 All ER 105. The limits within which presumptions hold as between vendor and purchaser were defined thus in the days of jury trials: 'If the case be such that sitting before a jury it would be the duty of a judge to give a clear direction in favour of the fact, then it is to be considered as without reasonable doubt; but if it would be the duty of a judge to leave it to a jury to pronounce upon the effect of the evidence, then it is to be considered as too doubtful to conclude a purchaser': *Emery v Grocock* (1821) 6 Madd 54 at 57 per Leach V-C. See also *England d Syburn v Slade* (1792) 4 Term Rep 682; *Doe d Bowerman v Sybourn* (1796) 7 Term Rep 2; *Hillary v Waller* (1806) 12 Ves 239 at 254, 270; *MEPC Ltd v Christian-Edwards* [1981] AC 205, [1979] 3 All ER 752, HL.

9 See 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 190.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/(iii) Proof of Title/B. PROOF OF PARTICULAR MATTERS/162. Payment of inheritance tax.

#### 162. Payment of inheritance tax.

Payment of inheritance tax is proved by the certificate of discharge of the Commissioners of Inland Revenue<sup>1</sup>.

1 See the Inheritance Tax Act 1984 s 239(1); and INHERITANCE TAXATION vol 24 (Reissue) PARAS 687-688. Receipts for inheritance tax are not required in the case of deaths after 1925, since for the Inland Revenue charge to be effective against a purchaser it must be registered as a land charge: see INHERITANCE TAXATION vol 24 (Reissue) PARA 686; LAND CHARGES vol 26 (2004 Reissue) PARA 634; LAND REGISTRATION vol 26 (2004 Reissue) PARA 938. See also PARAS 144 note 6 ante, 164 note 9 post.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/ (iv) Requisitions on Title/163. Examination of deeds.

## **(iv) Requisitions on Title**

### **163. Examination of deeds.**

On receipt of the abstract the purchaser's solicitor<sup>1</sup> peruses it and examines it with the original documents<sup>2</sup>. This examination is directed (1) to the substance of the documents; (2) to formal matters; and (3) to any incidental matters relevant to the title which do not appear on the abstract. As to substance, it must be ascertained that the abstract, so far as it purports to give the contents of the documents, gives them correctly and with sufficient fullness, and that no material part of any document is omitted. As to formal matters, it is necessary to ensure that the documents are correctly stamped, properly executed and duly indorsed with any necessary memoranda of acknowledgment, registration, enrolment or other requirement. As to incidental matters the solicitor must make certain that there are no notices or memoranda with the documents, or annexed to or indorsed upon them, or any suspicious matters as regards execution or otherwise, or as regards the custody of the deeds, from which it may be inferred that the vendor's title is subject to rights of third persons<sup>3</sup>.

1 See PARA 3 ante. As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 ante.

2 As to notice to the purchaser of matters discoverable by the usual inquiries and inspections see the Law of Property Act 1925 s 199(1)(ii); and EQUITY vol 16(2) (Reissue) PARA 576 et seq. Recitals may be framed with the highly desirable and perfectly honest object of keeping a trust off the title: see *Re Chafer and Randall's Contract* [1916] 2 Ch 8 at 19, CA.

3 As to suspicions raised by the position of the receipt on a deed under the old practice see *Kennedy v Green* (1834) 3 My & K 699; and cf *Greenslade v Dare* (1855) 20 Beav 284, where there was no receipt. The receipt is now embodied in the deed: see the Law of Property Act 1925 s 67, applying to deeds executed after 31 December 1881; and PARAS 309-310 post. As to a case where the purchaser's solicitor was directed, but neglected, to examine a will, and the purchaser was discharged but made liable in costs see *M'Culloch v Gregory* (1855) 1 K & J 286 at 293. A will now takes effect in equity only, and in general a purchaser is only concerned with the probate, if he takes a title direct from the executor, or with the probate followed by an assent, where an assent has been made. It seems, however, that if the will is brought on the title, the purchaser can make a requisition in respect of an assent not made in accordance with the will: *Re Duce and Boots Cash Chemists (Southern) Ltd's Contract* [1937] Ch 642, [1937] 3 All ER 788. See also EXECUTORS AND ADMINISTRATORS.

## **UPDATE**

### **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/ (iv) Requisitions on Title/164. Nature of requisitions.

### **164. Nature of requisitions.**

After perusing the abstract and examining the deeds, the purchaser's solicitor<sup>1</sup> prepares his requisitions on the title and conveyance<sup>2</sup>. Where there have been preliminary inquiries, few

requisitions other than those strictly on title are now necessary, but it is still his duty to make any appropriate requisitions, even if the preliminary inquiries have been so complete that it is only necessary to ask whether the answers to them are still complete and accurate<sup>3</sup>. The requisitions on title fall generally under the following heads: (1) that the abstracted documents, though efficacious, do not show the title which the purchaser is entitled to obtain, having regard to any special stipulations in the contract<sup>4</sup> (in which case a further abstract is asked for<sup>5</sup>); (2) that particular documents do not have the effect required in order to make out the vendor's title; (3) that there are incumbrances on the property remaining unsatisfied<sup>6</sup>; (4) that the identity of the property is not shown<sup>7</sup>; (5) that the documents are not in order as to stamping, execution or other formal matters<sup>8</sup>; and (6) that evidence additional to that already furnished is required as to matters of pedigree or otherwise<sup>9</sup>.

1 See PARA 3 ante. As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 ante.

2 See *Re Ossemsley Estates Ltd* [1937] 3 All ER 774, 81 Sol Jo 683, CA. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

3 *Goody v Baring* [1956] 2 All ER 11 at 16-17, [1956] 1 WLR 448 at 456 per Danckwerts J. As to inquiries see PARA 4 et seq ante.

4 As to the title which the purchaser can require under an open contract see PARA 137 ante; and as to special restrictions imposed by the contract see PARA 90 et seq ante. See also the cases cited in PARA 226 note 3 post.

5 A perfect abstract, in the strict sense of the term, is an abstract which shows a good title (*Morley v Cook* (1842) 2 Hare 106 at 111), but for particular purposes it may mean the most perfect abstract in the vendor's possession, actual or constructive at the time of his delivering it (*Morley v Cook* supra at 112). Cf *Blackburn v Smith* (1848) 2 Exch 783; *Want v Stallibrass* (1873) LR 8 Exch 175 at 179; and *Gray v Fowler* (1873) LR 8 Exch 249 at 279 ('full and sufficient abstract'). The abstract is not perfect if it does not show the true state of the title: *Steer v Crowley* (1863) 14 CBNS 337 at 359. See also PARAS 100-101 ante.

6 See PARA 89 ante.

7 See PARA 109 ante.

8 See PARA 97 ante.

9 It has been usual also to require evidence as to payment of death duties (now inheritance tax), but this is now only necessary in exceptional cases. Death duties in the case of persons who died before 1926 will usually be barred by the lapse of 12 years, and in cases of death since 1925 the land charges register or the register of title will show whether a charge for death duties (or inheritance tax) has been registered; if not, a purchaser takes free from these: see PARAS 144 note 6, 162 note 1 ante; and 2 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 1185 et seq, 1201 et seq.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/ (iv) Requisitions on Title/165. Requisitions as to the conveyance.

### 165. Requisitions as to the conveyance.

The purchaser may make requisitions as to the conveyance<sup>1</sup>. These assume that the vendor has shown that he can either alone, or jointly with other persons whose concurrence he can require, make a title to the property, and the only question is as to the persons to make the conveyance and the form which it is to take<sup>2</sup>.

1 As to the distinction between requisitions as to title and requisitions as to conveyance see PARA 104 ante.

2 As to the parties to make the conveyance and its form see PARA 269 et seq post. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/ (iv) Requisitions on Title/166. Vendor's right of rescission.

### 166. Vendor's right of rescission.

The conditions of sale may give the vendor the right to rescind the contract in the event of any requisition or objection being made which he is unable or unwilling to comply with, and it is then necessary for the purchaser to take care that he does not, by making a requisition not really essential, run the risk of losing the purchase. More usually the right of rescission is made to arise only when a requisition is persisted in, and the purchaser runs no such risk in making the requisition in the first instance<sup>1</sup>. Requisitions should, however, never be frivolous or unnecessary. They should either call attention to a real or apprehended defect in the title, or ask for relevant information<sup>2</sup>.

1 However, the Standard Conditions of Sale (3rd Edn) do not contain any such provision; cf the National Conditions of Sale (20th Edn), condition 10. See also PARA 104 et seq ante. As to the Conditions of Sale see PARA 1 note 9 ante.

2 As to searching requisitions regarding possible defects not disclosed by the title or otherwise known to the purchaser, which the vendor need not answer see *Re Ford and Hill* (1879) 10 ChD 365, CA; *Taylor v London and County Banking Co* [1901] 2 Ch 231 at 258, CA; and *Luff v Raymond* [1982] LS Gaz R 1330.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.



Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/ (v) Searches/167. Searches for land charges.

## **(v) Searches**

### **167. Searches for land charges.**

In the case of unregistered land<sup>1</sup>, searches in the registers kept at the Land Registry<sup>2</sup> are normally deferred until after the purchaser has entered into a binding contract, unless there is reason to suppose that they will reveal some matter requiring explanation or causing difficulty, because the entries in these registers are against the names of the owners from time to time of the land and not against the land itself<sup>3</sup>, and, until the abstract of title has been delivered, it is not normally known against what names searches should be made<sup>4</sup>. These searches should be made within 15 days of the date on which completion is to take place in order that the protection given by the official certificate of search may extend up to that date<sup>5</sup>. A search of the local land charges register<sup>6</sup> does not protect the purchaser against unregistered charges<sup>7</sup>, but a purchaser who has thus been misled by the result of the search will normally be entitled to compensation out of public funds<sup>8</sup>.

1 As to searches in the case of registered land see PARA 169 post; as to searches to ensure that land has never been registered see PARA 2 ante; and as to the Land Registry see LAND REGISTRATION vol 26 (2004 Reissue) PARA 1064 et seq.

2 See LAND CHARGES vol 26 (2004 Reissue) PARA 622 et seq.

3 See LAND CHARGES vol 26 (2004 Reissue) PARA 609.

4 As to the right to search and the mode of search see LAND CHARGES vol 26 (2004 Reissue) PARA 696 et seq. As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 ante.

5 See LAND CHARGES vol 26 (2004 Reissue) PARA 701.

6 As to the local land charges register see LAND CHARGES vol 26 (2004 Reissue) PARAS 671-672.

7 ie other than a light obstruction notice: see LAND CHARGES vol 26 (2004 Reissue) PARA 694.

8 In the case of a contract which is dependent upon or avoidable by reference to a search for local land charges, the search must be timed to coincide with completion; in other cases, the search must be before the date of the contract: see LAND CHARGES vol 26 (2004 Reissue) PARA 694.

## **UPDATE**

### **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/ (v) Searches/168. Searches in respect of farms and companies.

### **168. Searches in respect of farms and companies.**

Searches may need to be made or repeated, where the land includes farm property, in the register of agricultural charges<sup>1</sup>, or, where the vendor is a company, in the registers kept by the Registrar of Companies<sup>2</sup>.

1 See PARA 22 ante; and AGRICULTURAL PRODUCTION AND MARKETING vol 1 (2008) PARA 1331.

2 See PARA 22 ante; and COMPANIES vol 15 (2009) PARA 1279 et seq. As to the Registrar of Companies see COMPANIES vol 14 (2009) PARA 131 et seq.

#### **UPDATE**

### **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/ (v) Searches/169. Searches in the case of registered land.

### **169. Searches in the case of registered land.**

In the case of land registered with an absolute title, searches under the Land Charges Act 1972 are not required<sup>1</sup> and are replaced by an official search against the title in question<sup>2</sup>, but where the registration is of a possessory or qualified title, the same searches must be made as in the case of unregistered land so far as matters are excepted from the registration<sup>3</sup>.

1 See LAND CHARGES vol 26 (2004 Reissue) PARA 605; LAND REGISTRATION vol 26 (2004 Reissue) PARAS 807 (inapplicability of the Land Charges Act 1972 to registered land), 859 (conclusiveness of register). See also LAND CHARGES vol 26 (2004 Reissue) PARA 605 (purchaser not affected by notice of land charges capable of being protected under the Land Registration Act 1925).

2 See LAND REGISTRATION vol 26 (2004 Reissue) PARA 1110 et seq (official search).

3 See LAND REGISTRATION vol 26 (2004 Reissue) PARAS 835-837 (effect of first registration of freehold land), 838-841 (effect of first registration of leasehold land), 859 (information supplied where register not conclusive).

#### **UPDATE**

### **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information

relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/ (vi) Expenses/170. Expense of making abstract.

## **(vi) Expenses**

### **170. Expense of making abstract.**

The vendor is bound to make and deliver, at his own expense, a perfect abstract<sup>1</sup>, that is, an abstract showing such a title as the purchaser is entitled to obtain under the contract<sup>2</sup>. If the documents of title are not in his possession, he must himself bear the cost of procuring them for the purpose of furnishing the abstract<sup>3</sup>. The vendor is not relieved from the expense of delivering a proper abstract by the mere fact that the purchaser is entitled under his contract to a free conveyance<sup>4</sup>.

1 *Re Johnson and Tustin* (1885) 30 ChD 42, CA; *Re Stamford, Spalding and Boston Banking Co and Knight's Contract* [1900] 1 Ch 287. However, in sales under the Lands Clauses Consolidation Act 1845 s 82, or the Compulsory Purchase Act 1965 s 23(1), the costs of the abstract, in the absence of agreement, are thrown on the purchaser: see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 659. As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 ante.

2 See *Morley v Cook* (1842) 2 Hare 106 at 111; and PARAS 90, 137 et seq, 164 note 5 ante.

3 See the Law of Property Act 1925 s 45(4) (see PARAS 171-172 post), which does not apply to a document in the chain of title. It assumes that a perfect abstract has been delivered, and deals entirely with matters subsequent to that: *Re Stamford, Spalding and Boston Banking Co and Knight's Contract* [1900] 1 Ch 287 at 291 per North J.

4 *Re Pelly and Jacob's Contract* (1899) 80 LT 45. It is, however, usual to stipulate in such cases that there is to be no investigation of title: see PARA 130 ante.

## **UPDATE**

### **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/ (vi) Expenses/171. Expense of certificates and other evidence.

### **171. Expense of certificates and other evidence.**

On a sale<sup>1</sup> of land<sup>2</sup> under an open contract, the expenses of the production and inspection of all documents of title not in the possession of the vendor or his mortgagee or trustee, and the

expenses of all journeys incidental to such production or inspection, fall on the purchaser<sup>3</sup> where he requires such expenses to be incurred for the purpose of verifying the abstract or for any other purpose<sup>4</sup>, unless the contract otherwise stipulates<sup>5</sup>.

Where the documents are in the vendor's possession and are produced at the proper place for inspection, that is to say either at the office of the vendor's solicitor<sup>6</sup>, or near the land sold, or in London<sup>7</sup>, the purchaser must pay the cost of their inspection by his own solicitor, but if they are produced elsewhere the vendor must defray any extra costs arising<sup>8</sup>. Documents in the possession of the vendor's mortgagee must in like manner be produced by the mortgagee, usually at the office of the mortgagee's solicitor. The purchaser must pay the costs of their inspection by his own solicitor but not the costs of the mortgagee<sup>9</sup>.

1 For the meaning of 'sale' see PARA 139 note 2 ante.

2 For the meaning of 'land' see PARA 139 note 1 ante.

3 For the meaning of 'purchaser' see PARA 55 note 16 ante.

4 Law of Property Act 1925 s 45(4)(a), replacing the Conveyancing Act 1881 s 3(6) (repealed), in an amended form so as to relieve the purchaser of the expense of production of documents in the possession of the vendor's mortgagee or trustee. Under the earlier enactment the purchaser had to pay the costs of procuring the production of title deeds in the hands of the vendor's mortgagee (*Re Willett and Argenti* (1889) 60 LT 735) or trustees (*Re Ebsworth and Tidy's Contract* (1889) 42 ChD 23 at 27, CA). See further PARA 172 note 2 post. However, the purchaser must pay the costs of procuring the production even of a deed which is the root of the vendor's title, if it is not in the vendor's possession: *Re Stuart and Olivant and Seadon's Contract* [1896] 2 Ch 328, CA. As to the former practice, cf Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 431; and as to the effect of the Law of Property Act 1925 s 45(4) see PARA 170 note 3 ante. As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 ante.

5 Ibid s 45(10) proviso.

6 See PARA 3 ante.

7 1 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 415; 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 164. Strictly the rule refers to the vendor's residence, but this means in practice his solicitors' office. Arguably, the rule is obsolete; the current practice is for production to be at the office of the vendor's solicitor or his mortgagee's solicitor.

8 *Hughes v Wynne* (1836) 8 Sim 85; affd (1837) 1 Jur 720. If the vendor has the option of producing them at any one of several specified places, the purchaser is entitled to reasonable notice of the place selected: *Rippinghall v Lloyd* (1833) 5 B & Ad 742. As a rule, a country solicitor is not allowed the cost of journeys to London for the purpose of examining title deeds except in special circumstances (*Re Tryon* (1844) 7 Beav 496), and it is immaterial that he makes the journey at the request of his client, unless he has first explained to him the usage of the profession to dispense with such attendance (*Alsop v Lord Oxford* (1833) 1 My & K 564; *Horlock v Smith* (1837) 2 My & Cr 495 at 523). A London solicitor is not bound to employ a country agent, but may send his clerk to examine the deeds: *Hughes v Wynne* supra.

9 See note 4 supra.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/ (vi) Expenses/172. Expense of producing deeds.

### **172. Expense of producing deeds.**

In the absence of any stipulation or contrary intention expressed in the contract<sup>1</sup> (1) the expenses of searching for, procuring, making, verifying and producing all certificates, declarations, evidence and information not in the possession of the vendor or his mortgagee or trustee must be borne by the purchaser<sup>2</sup>; (2) all copies or abstracts<sup>3</sup> of or extracts from documents of title not in the possession of the vendor or his mortgagee or trustee, and required by the purchaser for whatever purpose, must be made at the expense of the purchaser<sup>4</sup>; and (3) the expenses of copying any documents in the possession of the vendor or his mortgagee or trustee, which the purchaser requires to be delivered to him, must be borne by the purchaser<sup>5</sup>.

1 Law of Property Act 1925 s 45(10) proviso.

2 Ibid s 45(4)(b), reproducing the Conveyancing Act 1881 s 3(6), (9) (repealed), with amendment so as to include documents in the possession of the vendor's mortgagee or trustee. For the meaning of 'purchaser' see PARA 55 note 16 ante. Apart from statute, all the expense of procuring the evidence necessary for verifying the abstract falls on the vendor. Where lessees covenant to finish a house to the satisfaction of the lessor's surveyor, the certificate of the surveyor's approval is neither a 'certificate' nor an 'evidence' within the statutory provision; it is not like a certificate of a pre-existing fact, such as a birth, a marriage or a death, but it is the fact itself and forms part of the vendors' title, which must be procured at their expense: *Re Moody and Yates' Contract* (1885) 30 ChD 344 at 349, CA, per Fry LJ. Where a fact is stated in the abstract, but the evidence of it is not in the vendor's possession, the expense of procuring the evidence falls on the purchaser: *Re Conlon and Faulkener's Contract* [1916] 1 IR 241; *Re Wright and Thompson's Contract* [1920] 1 Ch 191; *Hopkins v Geoghegan* [1931] IR 135. Cf *Re Edwards and Rudkin to Green* (1888) 58 LT 789.

3 As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 ante.

4 Law of Property Act 1925 s 45(4)(b), reproducing the Conveyancing Act 1881 s 3(6), (9) (repealed), in an amended form: see note 2 supra. Notwithstanding the wide language of the statutory provision, it does not relieve the vendor from making a proper abstract and procuring the necessary documents for making it at his own expense (see PARA 170 ante); nor does it affect the ordinary right of the purchaser to have the title deeds handed over on completion, and any expenses incurred in obtaining them for that purpose, if they are not in the vendor's possession, must be borne by the vendor: *Re Duthy and Jesson's Contract* [1898] 1 Ch 419.

5 Law of Property Act 1925 s 45(4).

## **UPDATE**

### **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(1) PROOF AND INVESTIGATION OF TITLE/ (vi) Expenses/173. Sale in lots.

### **173. Sale in lots.**

Subject to any stipulation or contrary intention expressed in the contract<sup>1</sup>, on a sale<sup>2</sup> of property in lots, the purchaser<sup>3</sup> of two or more lots held wholly or in part under the same title is not entitled to more than one abstract<sup>4</sup> of the common title, except at his own expense<sup>5</sup>.

1 Law of Property Act 1925 s 45(10) proviso.

2 For the meaning of 'sale' see PARA 139 note 2 ante.

3 For the meaning of 'purchaser' see PARA 55 note 16 ante.

4 As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 ante.

5 Law of Property Act 1925 s 45(5), reproducing the Conveyancing Act 1881 s 3(7) (repealed). See also *Re Simmons' Contract* [1908] 1 Ch 452.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (2) ACCEPTANCE OF TITLE BY THE PURCHASER/174. Acceptance of title.

## (2) ACCEPTANCE OF TITLE BY THE PURCHASER

### 174. Acceptance of title.

A purchaser is deemed to have accepted the title when the last outstanding requisition has been answered to his satisfaction by the vendor. Acceptance need not be notified to the vendor<sup>1</sup>.

If the purchaser fails to send in requisitions or objections within the time fixed by the contract for that purpose<sup>2</sup>, or if, although not satisfied with the vendor's replies to any requisitions or objections, he does not insist upon satisfactory answers, he may be held to have waived his right to make requisitions or objections, or to insist on those which he has made, and he is then deemed to have accepted the title<sup>3</sup>. If the purchaser enters into possession, or pays the whole or part of the purchase money, or does other acts which a purchaser is not bound to do until a good title has been made, he may be deemed to have waived objections to the title<sup>4</sup>. However, this is not the case if the purchaser has entered into possession under an express condition in the contract enabling him to do so before completion<sup>5</sup>, or where the vendor has consented to his doing so without prejudice to his right to require a good title<sup>6</sup>, nor where the purchaser was already in possession at the time of the sale, unless he has remained for a long time without raising objections as to title<sup>7</sup>.

1 *Re Highett and Bird's Contract* [1902] 2 Ch 214; affd [1903] 1 Ch 287, CA. See the Statutory Form of Conditions of Sale 1925, SR & O 1925/779, condition 6(1), (2); the Standard Conditions of Sale (3rd Edn), condition 4.1.1; and PARAS 76, 101-102 ante. Under the Standard Conditions of Sale (3rd Edn), a leasehold property is sold subject to any subsisting breach of a condition or tenant's obligation relating to the physical state of the property which renders the lease liable to forfeiture (condition 3.2.2), and a sublease is granted subject to any subsisting breach of a condition or tenant's obligation relating to the physical state of the property which renders the vendor's own lease liable to forfeiture (condition 3.2.3). As to the Standard Conditions of Sale see PARA 1 note 9 ante.

2 See PARA 102 ante. As to discovery of a mistake in the abstract after acceptance of the title see *M'Culloch v Gregory* (1855) 1 K & J 286, where a will, which the purchaser's solicitor neglected to examine, was misstated in the abstract. The mistake was discovered after the acceptance of title, and the purchaser was discharged on return of the purchase money, but with loss of interest on his deposit and on the payment of costs. As to the effect of the delivery of a supplementary abstract upon the time limit for requisitions see PARA 102 ante; and as to the formation of the contract see PARAS 23-40 ante. As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 ante.

3 *Burroughs v Oakley* (1819) 3 Swan 159 at 171. Cf *Flexman v Corbett* [1930] 1 Ch 672; and see PARA 102 note 5 ante.

4 *Fludyer v Cocker* (1805) 12 Ves 25 at 27; *Fleetwood v Green* (1809) 15 Ves 594; *Binks v Lord Rokeby* (1818) 2 Swan 222; *Hall v Laver* (1838) 3 Y & C Ex 191; *Haydon v Bell* (1838) 1 Beav 337; *Sibbald v Lowrie* (1853) 23 LJ Ch 593; *Wallis v Woodyear* (1855) 2 Jur NS 179; *Deller v Simonds* (1859) 5 Jur NS 997 at 1002. As to letting the property cf *Re Barrington, ex p Sidebotham* (1834) 1 Mont & A 655 at 663 (affd (1835) 4 Deac & Ch 461); and *Simpson v Sadd* (1854) 4 De GM & G 665. Delivery of the keys of a house is equivalent to giving possession: *Guest v Homfrey* (1801) 5 Ves 818. However, these acts do not give rise to such implication where they are accompanied by continued negotiations as to the title: *Knatchbull v Grueber* (1815) 1 Madd 153 at 170 (affd (1817) 3 Mer 124); *Burroughs v Oakley* (1819) 3 Swan 159. See also *Rellie v Pyke* [1936] 1 All ER 345 (entry into possession without waiver).

5 See *Bolton v London School Board* (1878) 7 ChD 766. The ordinary provision as to possession on the day fixed for completion does not have the same effect: *Bown v Stenson* (1857) 24 Beav 631. Under the Standard Conditions of Sale (3rd Edn), entry into occupation by the purchaser pending completion does not affect his right to raise requisitions: see conditions 5.2.1, 5.2.7; and PARA 119 ante. Strictly, title should not be accepted until the deeds and facts appearing on the abstract are proved by proper evidence (see *Newall v Smith* (1820) 1 Jac & W 263), but since evidence not in the vendor's possession must be procured at the purchaser's expense (see PARA 171 ante), it is usual to assume, without strict proof, facts as to which there is no substantial doubt. As to completion see PARAS 262-325 post.

6 See *Burroughs v Oakley* (1819) 3 Swan 159.

7 *Stevens v Guppy* (1828) 3 Russ 171. See also *Vancouver v Bliss* (1805) 11 Ves 458 at 464; *Dixon v Astley* (1816) 1 Mer 133.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (2) ACCEPTANCE OF TITLE BY THE PURCHASER/175. Effect of submitting draft conveyance or transfer.

### 175. Effect of submitting draft conveyance or transfer.

The submission by the purchaser of the draft conveyance or transfer to the vendor for his approval does not necessarily operate as an acceptance of the title<sup>1</sup>, but it is a circumstance from which the inference may be drawn that outstanding objections or requisitions have been waived and the title accepted<sup>2</sup>.

1 Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 345; *Burroughs v Oakley* (1819) 3 Swan 159 at 171; *Harwood v Bland* (1842) Fl & K 540; *Lukey v Higgs* (1855) 24 LJ Ch 495. See also PARA 174 ante; and *Re Perriam, Perriam v Perriam* (1883) 32 WR 369, where the taking of a conveyance of property by the correct description and payment of the purchase money into court were held not to waive a claim to compensation for misdescription in the particulars. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

2 See *Clive v Beaumont* (1848) 1 De G & Sm 397 at 406; *Smith v Capron* (1849) 7 Hare 185 at 191; and *Sweet v Meredith* (1862) 8 Jur NS 637 (subsequent proceedings (1863) 9 Jur NS 569). In practice, the draft conveyance is frequently submitted along with the requisitions, and its delivery is made subject to outstanding questions of title, examination of the deeds and searches. As to preparation of the conveyance or transfer see PARA 262 post.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (2) ACCEPTANCE OF TITLE BY THE PURCHASER/176. Extent of acceptance of title.

#### 176. Extent of acceptance of title.

In whatever manner an acceptance of title has taken place, it is an acceptance only of the title shown by the abstract<sup>1</sup>, and does not preclude the purchaser from taking objections, not precluded by the contract, by reason of defects not disclosed by the abstract which he subsequently discovers<sup>2</sup>. Such acceptance does not operate as a waiver of the purchaser's right to have the abstract verified<sup>3</sup>; nor does it preclude objections to matters which are matters of conveyance rather than of title, such as the existence of charges upon the property which are removable by the vendor<sup>4</sup>. If a purchaser is willing to accept the title upon a specific objection being removed, and to waive all other objections, the waiver is conditional only on the removal of that specific objection<sup>5</sup>.

1 As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 ante.

2 *Blacklow v Laws* (1842) 2 Hare 40 at 47.

3 *Southby v Hutt* (1837) 2 My & Cr 207; *Turquand v Rhodes* (1868) 37 LJ Ch 830.

4 *Re Gloag and Miller's Contract* (1883) 23 ChD 320. As to objections to matters of conveyance see PARA 165 ante.

5 *Lesturgeon v Martin* (1834) 3 My & K 255.



## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (3) RIGHTS AND DUTIES WITH RESPECT TO THE PROPERTY/(i) Purchaser's Beneficial Ownership; Vendor's Trusteeship/177. Effect of agreement for sale.

### (3) RIGHTS AND DUTIES WITH RESPECT TO THE PROPERTY

#### (i) Purchaser's Beneficial Ownership; Vendor's Trusteeship

##### 177. Effect of agreement for sale.

An agreement for the sale of land, of which specific performance can be ordered<sup>1</sup>, operates as an alienation by the vendor of his beneficial proprietary interest in the property<sup>2</sup>. As from the date of the contract<sup>3</sup>, his beneficial interest is transferred from the land to the purchase money, and, if his interest was of the nature of realty, it is from that date converted into personality<sup>4</sup>. As regards the land, he becomes, as between himself and the purchaser, a constructive trustee for the purchaser<sup>5</sup>, with the right as trustee to be indemnified by the purchaser against the liabilities of the trust property<sup>6</sup>. Thus the purchaser becomes beneficial owner, with the right to dispose of the property by sale, mortgage or otherwise, and to devise it by will<sup>7</sup>, and on his death intestate it devolves on his legal personal representatives, who hold it, subject to the requirements of administration, on trust with a power of sale for the persons entitled on intestacy<sup>8</sup>.

1 See PARAS 247-248 post; and *Cornwall v Henson* [1899] 2 Ch 710 at 714 (revsd on the facts [1900] 2 Ch 298, CA). There must be a binding contract for sale: see PARA 29 ante.

2 *Wall v Bright* (1820) 1 Jac & W 494 at 500 per Plumer MR. The contract must be one for immediate sale: *Rose v Watson* (1864) 10 HL Cas 672 at 678. As to a sale under court order see PARA 133-136 ante.

3 As to the formation of the contract see PARAS 23-40 ante.

4 See EQUITY vol 16(2) (Reissue) PARA 701. As to the effect of the exercise of an option to purchase see EQUITY vol 16(2) (Reissue) PARA 714; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 135 et seq.

5 *Wall v Bright* (1820) 1 Jac & W 494; *Shaw v Foster* (1872) LR 5 HL 321 at 333. This is the case if specific performance of the contract would be ordered: *Howard v Miller* [1915] AC 318, PC. Before the coming into effect of the statutory provisions by which real estate held by a deceased person in trust devolves on his personal representative (see EXECUTORS AND ADMINISTRATORS), the property would have passed under a devise by the vendor of trust estates: *Lysaght v Edwards* (1876) 2 ChD 499. As to the devolution of real estate generally see EXECUTORS AND ADMINISTRATORS.

6 *Dodson v Downey* [1901] 2 Ch 620 at 623. See also *Golden Bread Co Ltd v Hemmings* [1922] 1 Ch 162.

7 *Paine v Meller* (1801) 6 Ves 349 at 352; *Shaw v Foster* (1872) LR 5 HL 321 at 333, 338; *Gordon Hill Trust Ltd v Segall* [1941] 2 All ER 379, CA; and see MORTGAGE vol 77 (2010) PARA 101 et seq; WILLS vol 50 (2005 Reissue) PARA 582.

8 *Paine v Meller* (1801) 6 Ves 349; *Broome v Monck* (1805) 10 Ves 597 at 620. It passes under a general devise of land or real estate: *Broome v Monck* supra. See also *Greenhill v Greenhill* (1711) Prec Ch 320; *Potter v Potter* (1750) 1 Ves Sen 437; *Capel v Girdler* (1804) 9 Ves 509 at 510; *Marston v Roe d Fox* (1838) 8 Ad & El 14 at 63, Ex Ch; and EXECUTORS AND ADMINISTRATORS; WILLS vol 50 (2005 Reissue) PARAS 315, 329, 546-548. As to the devolution of real estate upon personal representatives and the distribution of the residuary estate on intestacy see the Administration of Estates Act 1925 s 33 (as amended); and EXECUTORS AND ADMINISTRATORS.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (3) RIGHTS AND DUTIES WITH RESPECT TO THE PROPERTY/(i) Purchaser's Beneficial Ownership; Vendor's Trusteeship/178. Nature of vendor's trusteeship.

#### 178. Nature of vendor's trusteeship.

The vendor's trusteeship is in the first place limited to the precise property contracted to be sold. Formerly a contract to sell property did not (apart from special stipulation) include the benefit of the insurance policy relating to the property<sup>1</sup>, but this position has been modified by statute<sup>2</sup>. Similarly, a contract to sell a property with vacant possession does not entitle the purchaser to receive a payment in respect of dilapidations payable under a lease which terminates between the date of the contract and the date of completion<sup>3</sup>, and the same rule applies to a payment of compensation on the derequisition of requisitioned property<sup>4</sup>.

In the second place the vendor is not a bare trustee. Until payment he retains a personal and substantial interest in the property, a right to protect that interest, and an active right to assert it if anything in derogation of it should be done, and the relation of trustee and beneficiary is subject to the trustee's paramount right to protect his own interest as vendor<sup>5</sup>. There is, in fact, only a qualified trusteeship until the price is paid and nothing remains to be done by either party except the execution of the transfer<sup>6</sup>. When that stage has been reached, the full relation of trustee and beneficiary thereby established relates back to the formation of the contract<sup>7</sup>.

The vendor's trusteeship and the purchaser's beneficial ownership are, moreover, conditional upon the performance of the contract<sup>8</sup>. If the contract is rescinded, or if, from want of title on the part of the vendor<sup>9</sup> or otherwise, the contract is such that specific performance could not be obtained, and the defect is not waived by the purchaser, the position is the same as regards the interests in the property as though the relation of vendor and purchaser had never arisen. The vendor is treated as if he had never been trustee, and the purchaser as if he had never been equitable owner<sup>10</sup>.

The vendor's breach of his obligations as trustee does not prevent him from serving a notice to complete<sup>11</sup>.

1 *Rayner v Preston* (1881) 18 ChD 1, CA. As to the formation of the contract see PARAS 23-40 post.

2 See PARAS 117-118 ante, 184 post.

3 As to the date of completion see PARA 185 post.

4 See PARA 192 post.

5 *Shaw v Foster* (1872) LR 5 HL 321 at 338. See also *Lysaght v Edwards* (1876) 2 ChD 499 at 506-507 per Jessel MR; *Raffety v Schofield* [1897] 1 Ch 937 at 943; *Ecclesiastical Comrs v Pinney* [1899] 2 Ch 729 at 735, CA; *Re Stucley, Stucley v Kekewich* [1906] 1 Ch 67 at 78, CA; and *Allen v IRC* [1914] 1 KB 327 at 334 (affd [1914] 2 KB 327, CA).

6 As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

7 *Rayner v Preston* (1881) 18 ChD 1 at 13, CA, per James LJ. See also *Wall v Bright* (1820) 1 Jac & W 494 at 503 per Plumer MR; *Shaw v Foster* (1872) LR 5 HL 321 at 356 per Lord Hatherley; and *Ridout v Fowler* [1904] 1 Ch 658 at 661. The vendor is not a trustee within the meaning of the Trustee Act 1925 (see TRUSTS vol 48 (2007 Reissue) PARA 601), at any rate until the purchase money is paid: *Re Carpenter* (1854) Kay 418; *Re Colling* (1886) 32 ChD 333, CA; cf *Re Cuming* (1869) 5 Ch App 72; *Re Pagani, Re Pagani's Trust* [1892] 1 Ch 236, CA; *Re Beaufort's Will* (1898) 43 Sol Jo 12.

8 See *Rayner v Preston* (1881) 18 ChD 1, CA.

9 *Broome v Monck* (1805) 10 Ves 597; *Lysaght v Edwards* (1876) 2 ChD 499 at 507; *Re Thomas, Thomas v Howell* (1886) 34 ChD 166.

10 *Cornwall v Henson* [1899] 2 Ch 710 (revsd on another ground [1900] 2 Ch 298, CA); *Plews v Samuel* [1904] 1 Ch 464; *Ridout v Fowler* [1904] 1 Ch 658 at 662 (affd on other grounds [1904] 2 Ch 93, CA). While it is still uncertain whether the contract will be performed, the vendor is only a trustee under a condition, and if the contract is not performed he again becomes absolute owner: see *Wall v Bright* (1820) 1 Jac & W 494 at 501.

11 *Prosper Homes Ltd v Hambros Bank Executor and Trustee Co Ltd* (1979) 39 P & CR 395. As to a notice to complete see PARA 121 ante.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### 178 Nature of vendor's trusteeship

NOTE 5--The vendor's obligations as trustee do not extend to a lessor's duty to impose covenants on purchasers of adjoining properties unless the duty is imposed by the contract of sale: *Englewood Properties Ltd v Patel* [2005] EWHC 188 (Ch), [2005] 3 All ER 307.

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### 179. Rights against third persons.

Until the contract is completed<sup>1</sup> by transfer of the legal estate to the purchaser, the vendor continues to be the proper person to enforce any rights in respect of the property which depend on the possession of the legal estate<sup>2</sup>. Subject to ultimate completion, the purchaser's interest ranks as against third persons like any other equitable interest, and it is subject to equities prior in date and, subject to any requirement of registration<sup>3</sup>, has priority over subsequent equitable and legal interests, except a legal interest taken for value and without

notice of the contract<sup>4</sup>. However, the purchaser is not, in general, entitled to enforce his interest against third persons until he has completed his title by transfer<sup>5</sup>, but if he pays his purchase money and takes a transfer of the legal estate without notice of an existing equity, subject to any requirement of registration he gains priority over it<sup>6</sup>. Since 1925 the purchaser has been able to register his contract as an estate contract<sup>7</sup>, and from the time he does so, no third person can obtain any interest in the property without notice of the purchaser's rights<sup>8</sup>. A purchaser is under no duty to register a contract for sale<sup>9</sup>.

Where the purchaser (A) loses his interest to a subsequent purchaser of the legal estate (B) through the operation of the registration provisions, the vendor holds the purchase money or other property received from (B) on trust for (A)<sup>10</sup>.

1 As to the formation of the contract see PARAS 23-40 ante; and as to the completion of the contract see PARAS 262-325 post.

2 This rule is sometimes expressed by saying that the doctrine of trusteeship applies only as between the parties to the contract of sale: see note 5 infra. The vendor is the proper person to give notice to quit to a tenant and this applies until the purchase money is paid even though a conveyance is executed before the payment: *Thompson v McCullough* [1947] KB 447, [1947] 1 All ER 265, CA. See generally *Leigh and Silavan Ltd v Aliakmon Shipping Co Ltd* [1986] AC 785, [1986] 2 All ER 145, HL; *MCC Proceeds Inc v Lehman Bros International (Europe)* [1998] 4 All ER 675, [1998] 2 BCLC 659, CA; and Goode 'Ownership and Obligation in Commercial Transactions' (1987) 103 LQR 433 at 455-458.

As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

3 As to the requirement of registration of an interest in land see LAND CHARGES vol 26 (2004 Reissue) PARA 605; LAND REGISTRATION vol 26 (2004 Reissue) PARAS 827 et seq, 911 et seq.

4 See EQUITY vol 16(2) (Reissue) PARA 612.

5 See *Tasker v Small* (1837) 3 My & Cr 63 at 70-71 per Lord Cottenham LC. The rule that, by a contract of purchase, the purchaser becomes in equity the owner of the property applies only as between the parties to the contract: *Tasker v Small* supra at 70 per Lord Cottenham LC. A conveyance without payment in full of the purchase money operates as an escrow: *Thompson v McCullough* [1947] KB 447, [1947] 1 All ER 265, CA (see note 6 infra). See also *Goodwin v Fielding* (1853) 4 De GM & G 90.

6 Where the conveyance and the payment of the purchase money are not simultaneous it would appear that the purchaser must be without notice both at the date of conveyance and the date of payment, whichever is later: see *Tildesley v Lodge* (1857) 3 Sm & G 543; and *Wigg v Wigg* (1739) 1 Atk 382. If the purchaser has notice of an equitable mortgage, he must ascertain for himself that it has been discharged. His acquisition of the legal estate is no protection if a receipt tendered by the vendor is a forgery: *Jared v Clements* [1903] 1 Ch 428, CA. If the equitable interest is registered as a land charge, the registration will operate as notice (see PARA 21 ante; and EQUITY vol 16(2) (Reissue) PARA 577; LAND CHARGES vol 26 (2004 Reissue) PARA 616), but if it is capable of registration and is not registered, it will be void against the purchaser (see LAND CHARGES vol 26 (2004 Reissue) PARA 643) and the purchaser will not be prejudicially affected by any notice which he may have of its existence (see *Midland Bank Trust Co Ltd v Green* [1981] AC 513, [1981] 1 All ER 153, HL; and EQUITY vol 16(2) (Reissue) PARA 583; LAND CHARGES vol 26 (2004 Reissue) PARA 616).

7 See the Land Charges Act 1972 s 2(4) Class C(iv) (as amended); and LAND CHARGES vol 26 (2004 Reissue) PARA 628. However, it is not the practice to register an ordinary contract for sale unless completion is to be delayed for a long period, although a solicitor who fails to protect his purchaser client's interest by registering the contract might well be liable in negligence: cf *Midland Bank Trust Co Ltd v Hett, Stubbs and Kemp (a firm)* [1979] Ch 384, [1978] 3 All ER 571, where the solicitor was liable in both contract and tort for failing to register a ten year option to purchase. As to the position in relation to registered land see *Bridges v Mees* [1957] Ch 475, [1957] 2 All ER 577 (contractual purchaser in actual occupation has overriding interest); and LAND REGISTRATION vol 26 (2004 Reissue) PARA 1021.

8 See PARA 21 ante; and EQUITY vol 16(2) (Reissue) PARA 577; LAND CHARGES vol 26 (2004 Reissue) PARA 616.

9 *Wright v Dean* [1948] Ch 686, [1948] 2 All ER 415; *Hollington Bros Ltd v Rhodes* [1951] 2 All ER 578n, [1951] WN 437.

10 *Lake v Bayliss* [1974] 2 All ER 1114, [1974] 1 WLR 1073.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (3) RIGHTS AND DUTIES WITH RESPECT TO THE PROPERTY/(i) Purchaser's Beneficial Ownership; Vendor's Trusteeship/180. Maintenance of property.

#### 180. Maintenance of property.

Because the vendor, while remaining in possession, is in a sense a trustee for the purchaser<sup>1</sup>, he is bound to take reasonable care that the property does not deteriorate between the date of the contract<sup>2</sup> and the time when possession is delivered to the purchaser<sup>3</sup>, and even where the delay in completion is due to the purchaser<sup>4</sup>, this duty remains binding on the vendor so long as he treats his possession as a security for the purchase money<sup>5</sup>.

1 See PARAS 177-178 ante.

2 As to the formation of the contract see PARAS 23-40 ante.

3 *Clarke v Ramuz* [1891] 2 QB 456 at 462, CA; *Phillips v Lamdin* [1949] 2 KB 33, [1949] 1 All ER 770 (removal of valuable door; order for replacement). The measure of liability is the same as in the case of any other trustee: *Phillips v Silvester* (1872) 8 Ch App 173 at 177; *Earl of Egmont v Smith, Smith v Earl of Egmont* (1877) 6 ChD 469 at 475; *Royal Bristol Permanent Building Society v Bomash* (1887) 35 ChD 390 at 398 per Kekewich J (see TRUSTS vol 48 (2007 Reissue) PARA 620). The substitution of a contractual tenant for a statutory tenant has been treated as deterioration: *Reehold Properties Ltd v Peacock* (1955) 165 Estates Gazette 114. See also *Abdulla v Shah* [1959] AC 124, [1959] 2 WLR 12, PC; and PARA 181 post. The vendor's duty is to make title and to look after the property as it is at the date of the contract, and therefore his duty as trustee does not extend to matters arising before the date of the contract: *Prosper Homes Ltd v Hambros Bank Executor and Trustee Co Ltd* (1979) 39 P & CR 395 at 400. The vendor may be liable for the acts of third parties, if the damage caused is the result of the vendor's failure to take reasonable care: see *Clarke v Ramuz* [1891] 2 QB 456, CA; *Davron Estates Ltd v Turnshire Ltd* (1982) 133 NLJ 937, CA (trespassers); *Royal Bristol Permanent Building Society v Bomash* (1887) 35 ChD 390 (outgoing tenant); and *Ware v Verderber* (1978) 247 Estates Gazette 1081 (furniture removers).

4 As to notice to complete see PARA 121 ante.

5 *Phillips v Silvester* (1872) 8 Ch App 173: see PARA 178 ante.

### UPDATE

#### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (3) RIGHTS AND DUTIES WITH RESPECT TO THE PROPERTY/(i) Purchaser's Beneficial Ownership; Vendor's Trusteeship/181. Repairs and preservation.

### **181. Repairs and preservation.**

In pursuance of his duty to preserve the property from deterioration, the vendor must act in regard to it as a provident beneficial owner<sup>1</sup>. If the property is leasehold, the vendor must perform all the covenants of the lease up to the time when the purchaser should take possession<sup>2</sup>. If the property is freehold, the vendor must keep it in repair so far as this can be done by ordinary expenditure<sup>3</sup>. He must not damage it himself<sup>4</sup>, and must prevent its being damaged by trespassers<sup>5</sup>, and, in the case of agricultural land, must maintain it in a proper state of management and cultivation<sup>6</sup>, and if the tenancy determines before completion he must, if he can, relet the land on a yearly tenancy so as to keep it full<sup>7</sup>. On the other hand, where premises are let at the date of the contract<sup>8</sup> and the tenant subsequently surrenders his tenancy, the vendor must not, without consulting the purchaser, relet the premises on a protected or otherwise disadvantageous tenancy<sup>9</sup>.

If damage is caused by the vendor's failure to perform any of these duties, the purchaser is entitled to have the amount of the loss deducted from the purchase money<sup>10</sup> or, if he has completed the purchase, he can recover the amount by way of damages<sup>11</sup>.

The maintenance of the property is a current expense which should be paid out of the rents and profits, and it is borne by the vendor so long as he is entitled to receive the rents and profits for his own benefit<sup>12</sup>. After that time it must be borne by the purchaser<sup>13</sup>.

1 *Wilson v Clapham* (1819) 1 Jac & W 36 at 38; *Sherwin v Shakspear* (1854) 5 De GM & G 517 at 537. Cf *Krehl v Park* (1874) 31 LT 325.

2 See *Palmer v Goren* (1856) 25 LJ Ch 841; *Dowson v Solomon* (1859) 1 Drew & Sm 1 at 10-11; *Newman v Maxwell* (1899) 80 LT 681. A breach of the covenant to repair is a defect of title: *Re Highett and Bird's Contract* [1902] 2 Ch 214 at 215; affd [1903] 1 Ch 287, CA. See also *Re Edie and Brown's Contract* (1888) 58 LT 307; *Re Lyne-Stephens and Scott-Miller's Contract* [1920] 1 Ch 472. Where purchasers contracted to take leaseholds in their existing state of disrepair the purchasers were held to have assumed liability for, and to agree to indemnify the vendor against, the cost of subsequent repairs: *Lockharts v Bernard Rosen & Co* [1922] 1 Ch 433; and see *Butler v Mountview Estates Ltd* [1951] 2 KB 563, [1951] 1 All ER 693. As to conditions of sale intended to protect the vendor see PARA 99 ante.

3 *Ferguson v Tadman* (1827) 1 Sim 530; *Regent's Canal Co v Ware* (1857) 23 Beav 575 at 588; *Royal Bristol Permanent Building Society v Bomash* (1887) 35 ChD 390 at 397.

4 *Phillips v Lamdin* [1949] 2 KB 33, [1949] 1 All ER 770 (replacement of Adam door by one of plain wood); *Lucie-Smith v Gorman* [1981] CLY 2866 (vacating house in mid-winter without turning off water supply).

5 *Royal Bristol Permanent Building Society v Bomash* (1887) 35 ChD 390 at 398; *Clarke v Ramuz* [1891] 2 QB 456, CA. Cf *Cedar Transport Group Ltd v First Wyvern Property Trustees Co Ltd* (1980) 258 Estates Gazette 1077 (on sale of empty warehouse, vendor's duty discharged by putting property in care of architects and builders).

6 *Foster v Deacon* (1818) 3 Madd 394; *Lord v Stephens* (1835) 1 Y & C Ex 222.

7 *Phillips v Silvester* (1872) 8 Ch App 173; *Earl of Egmont v Smith, Smith v Earl of Egmont* (1877) 6 ChD 469 at 475; *Raffety v Schofield* [1897] 1 Ch 937 at 944. See also PARA 191 note 3 post.

8 As to the formation of the contract see PARAS 23-40 ante.

9 *Abdulla v Shah* [1959] AC 124, [1959] 2 WLR 12, PC. Where premises are sold subject to an existing lease, the vendor may owe a duty to the purchaser to remedy a breach of covenant committed by the lessee after the date of the contract: *Prosper Homes Ltd v Hambros Bank Executor and Trustee Co Ltd* (1979) 39 P & CR 395.

10 For a form of order directing such deduction see Seton's Form of Decrees, Judgments and Orders in Equity (7th Edn, 1912) 2174.

11 *Clarke v Ramuz* [1891] 2 QB 456, CA.

12 As to the right to rents and profits see PARAS 188-193 post.

13 The rule in this respect is the same as that with regard to outgoings generally: see PARA 193 post. As to damages generally see DAMAGES.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (3) RIGHTS AND DUTIES WITH RESPECT TO THE PROPERTY/(i) Purchaser's Beneficial Ownership; Vendor's Trusteeship/182. Improvements.

#### 182. Improvements.

Where an extraordinary outlay in permanent repairs is necessary for the preservation of the property, the vendor is apparently entitled to be allowed as against the purchaser the amount so expended<sup>1</sup>. The vendor's duty in respect of the property does not extend to making improvements, for instance in expending money in building or in obtaining a renewal of a lease, and he cannot recover from the purchaser money so spent<sup>2</sup>.

1 See *Sherwin v Shakspear* (1854) 5 De GM & G 517 at 532; *Phillips v Silvester* (1872) 8 Ch App 173 at 176; *Bolton Partners v Lambert* (1888) 41 ChD 295 (on appeal (1889) 41 ChD 302, CA).

2 *Monro v Taylor* (1848) 8 Hare 51 at 60; cf *Master etc of Clare Hall v Harding* (1848) 6 Hare 273 at 296.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (3) RIGHTS AND DUTIES WITH RESPECT TO THE PROPERTY/ (ii) Particular Rights and Liabilities/183. Vendor's rights and duties.

#### (ii) Particular Rights and Liabilities

### 183. Vendor's rights and duties.

Pending the completion of the contract<sup>1</sup>, the rights of the vendor consist generally in (1) the right to retain possession until the purchase money has been paid<sup>2</sup>; (2) a lien on the property for the amount of the unpaid purchase money<sup>3</sup>; (3) a right until the proper time for completion to receive the rents and profits for his own benefit<sup>4</sup> and sums paid in respect of dilapidations on the expiry of a lease or a requisition<sup>5</sup>; and (4) a right after the proper time for completion, to interest on the unpaid purchase money until payment<sup>6</sup>. However, the vendor must preserve the property from deterioration and must pay the current outgoings<sup>7</sup>.

1 As to the formation of the contract see PARAS 23-40 ante; and as to the completion of the contract see PARAS 262-325 post.

2 See PARAS 185-186 post.

3 See PARA 187 post. As to the meaning of 'rents and profits' see PARA 189 post.

4 See PARA 188 post.

5 See PARA 192 post.

6 See PARAS 194, 197 post.

7 See PARAS 180-181 ante, 193 post.

### UPDATE

#### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (3) RIGHTS AND DUTIES WITH RESPECT TO THE PROPERTY/ (ii) Particular Rights and Liabilities/184. Purchaser's risk and rights.

### 184. Purchaser's risk and rights.

Subject to the vendor's duty to take reasonable care to prevent the deterioration of the property<sup>1</sup>, the property is at the risk of the purchaser<sup>2</sup>. The circumstances in which the purchaser may be entitled to the benefit of payments under any insurance policy effected by the vendor have already been mentioned<sup>3</sup>. The purchaser is entitled to any accretion to the value of the property<sup>4</sup>. From the proper time for completion<sup>5</sup> he is entitled to be credited with rents and profits, and is liable to be charged with outgoings<sup>6</sup>. If he has paid the purchase money or any part of it, and the purchase ultimately goes off without his default, he is entitled to a lien on the land for the amount which he has paid<sup>7</sup>.

1 See PARAS 180-181 ante.

2 *White v Nutts* (1702) 1 P Wms 61; *Paine v Meller* (1801) 6 Ves 349 at 352; *Harford v Purrier* (1816) 1 Madd 532 at 539; *Acland v Cuming*, *Gaisford v Acland* (1816) 2 Madd 28 at 32. See also *Amalgamated Investment*



*and Property Co Ltd v John Walker & Sons Ltd* [1976] 3 All ER 509, [1977] 1 WLR 164, CA (post-contractual listing of buildings as of special historic interest no defence to specific performance); cf para 248 note 7 post. Where an accident to the premises brings with it a legal obligation which must be satisfied immediately, eg when the premises fall down and injure adjoining property, the case falls within the same principle and the expense must be borne by the purchaser: *Robertson v Skelton* (1849) 12 Beav 260.

3 See PARAS 117-118 ante.

4 *Vesey v Elwood* (1842) 3 Dr & War 74 at 79. Thus if an interest for life is sold and the tenant for life dies before completion, the loss falls on the purchaser, but if it is a reversion that is sold, the benefit belongs to the purchaser: *White v Nutts* (1702) 1 P Wms 61; *Ex p Manning* (1727) 2 P Wms 410. If after the contract the estate is improved in the interval, or if the value is lessened by the failure of tenants or otherwise, and there is no fault on either side, the purchaser has the benefit or sustains the loss: *Harford v Purrier* (1816) 1 Madd 532 at 539. Similarly, the purchaser has the benefit of any unexpected diminution in the value of the consideration, where, for example, part of the consideration is an annuity on the vendor's life and the vendor dies immediately after the contract: *Mortimer v Capper* (1782) 1 Bro CC 156. See also 1 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 269.

5 As to completion see PARAS 262-325 post.

6 See PARAS 188-193 post.

7 As to the purchaser's lien see *Hick v Phillips* (1721) Prec Ch 575; *Lee-Parker v Izzet* [1971] 3 All ER 1099, [1971] 1 WLR 1688; and LIEN vol 68 (2008) PARA 864 et seq. Unless the purchaser has custody of the title deeds, the lien is registrable under the Land Charges Act 1972 s 2(4) Class C(iii) (as amended): see PARAS 128 ante, 187 post; and LAND CHARGES vol 26 (2004 Reissue) PARA 631. The lien extends to the costs of investigating title: *Kitton v Hewett* [1904] WN 21; *Re Furneaux and Aird's Contract* [1906] WN 215.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (3) RIGHTS AND DUTIES WITH RESPECT TO THE PROPERTY/ (iii) Possession and the Vendor's Lien/185. Material dates for completion of the contract.

### (iii) Possession and the Vendor's Lien

#### 185. Material dates for completion of the contract.

Three dates are material in regard to the completion of the contract<sup>1</sup>: (1) the date, if any, fixed by the contract for completion; (2) the date when the vendor shows and verifies such a title as the purchaser can require; and (3) the date of actual completion. In the ordinary course, completion consists of the purchaser paying the purchase money, or the balance<sup>2</sup>, and the vendor at the same time executing a transfer and delivering possession to the purchaser<sup>3</sup>. When these incidents are separated, the construction to be put upon a reference in the contract to the date for completion depends upon the terms and subject matter of the contract, although it seems that the reference is as a general rule to be taken to be a reference to the complete transfer of the estate and the final settlement of the business<sup>4</sup>.

The completion of the contract is conditional on the vendor making out his title<sup>5</sup>. Until the vendor makes out his title, the purchaser is not safe in paying the purchase money and taking

possession<sup>6</sup>. Hence the date when the vendor makes out his title is the earliest date at which completion should take place, and it is the proper date for completion if no date is fixed by the contract<sup>7</sup>.

If the contract fixes a date for completion, this is the proper date, and if this stipulation is of the essence of the contract<sup>8</sup>, the vendor must make out his title by that date, otherwise the purchaser cannot be required to complete either then or subsequently<sup>9</sup>. If it is not of the essence of the contract, and the title has not then been made out, the purchaser can be required to complete as soon as the title has been made out. In case of undue delay, either party may fix a reasonable time for completion, and this time then becomes of the essence of the contract<sup>10</sup>.

1 As to the formation of the contract see PARAS 23-40 ante; and as to the completion of the contract see PARAS 262-325 post.

2 There will usually be an adjustment for outgoings etc: see PARA 2 note 8 ante.

3 In addition, the purchaser must, in virtually all cases of a sale of a legal estate, apply to become the registered proprietor of that estate, whether as the first registered proprietor (see the Land Registration Act 1925 ss 123 (as substituted), 123A (as added); and LAND REGISTRATION) or as the new registered proprietor of an already registered estate (see ss 19, 22 (both as amended); and LAND REGISTRATION). The exceptions are that first registration is not required on: (1) the grant of a lease not exceeding 21 years; (2) the assignment of a lease which does not have more than 21 years to run; or (3) a first legal mortgage supported by a deposit of the documents of title of a lease which does not have more than 21 years to run: see s 123(1), (2) (s 123 as substituted); and LAND REGISTRATION vol 26 (2004 Reissue) PARA 827 et seq. Where the title is already registered, the only exception is the grant of a lease for a term not exceeding 21 years, or the assignment of such a lease (or a sublease derived out of it); such leases are overriding interests within s 70(1)(k) (as substituted) (see LAND REGISTRATION vol 26 (2004 Reissue) PARAS 866, 962): see ss 19, 22 (both as amended); and LAND REGISTRATION.

On a sale or other disposition of registered land to a purchaser other than a lessee or chargee, where the vendor is not himself registered as proprietor of the land or the charge giving a power of sale over the land, he must, at the request of the purchaser and at his own expense, and notwithstanding any stipulation to the contrary (ie in the conditions of sale), either procure the registration of himself as proprietor of the land or of the charge, as the case may be, or procure a disposition from the registered proprietor to the purchaser: s 110(5). Where, under the conditions of sale, the purchaser accepts the title before making a request under s 110(5), but then refuses to complete, the vendor is entitled to rescind the contract and forfeit the deposit: *Urban Manor Ltd v Sadiq* [1997] 1 WLR 1016, CA. As to other conveyancing problems that may be created by the 'registration gap' (ie the interval between completion and registration) see *Brown & Root Technology Ltd v Sun Alliance & London Assurance Co Ltd* (1996) 75 P & CR 223, CA; cf *Pinekerry Ltd v Kenneth Needs Contractors Ltd* (1992) 64 P & CR 245, CA; *Abbey National Building Society v Cann* [1991] 1 AC 56, [1990] 1 All ER 1085, HL (closing the 'gap' with regard to overriding interests under the Land Registration Act 1925 s 70(1)(g)). As to the date of completion see PARA 120 ante. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

4 See *Killner v France* [1946] 2 All ER 83, 175 LT 377, where the purchase money was paid and the purchaser let into possession, but the property was destroyed by enemy action before the date fixed by the contract for completion, and it was held that there was no completion and the purchaser was entitled to rescind. *Killner v France* supra approved a dictum in *Lewis v South Wales Rly Co* (1852) 10 Hare 113 at 119, where, however, in the circumstances of the case the reference was held to be to the payment of the purchase money. See also PARAS 179 note 6 ante, 262 post.

5 *Doe d Gray v Stanion* (1836) 1 M & W 695 at 701; and see PARA 137 ante.

6 *Binks v Lord Rokeby* (1818) 2 Swan 222 at 225; *Wilson v Clapham* (1819) 1 Jac & W 36 at 37. As to provisions in the conditions of sale see PARA 124 ante.

7 See 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 29. Where no date is fixed completion must be within a reasonable time (see *Simpson v Hughes* (1897) 66 LJ Ch 334, CA; *Nosotti v Auerbach* (1898) 79 LT 413 (affd (1899) 15 TLR 140, CA)), but as soon as the vendor has made out his title the purchaser should be ready to complete (see PARA 120 ante). As to possession upon a sale under order of the court, where no date is fixed see 2 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 1000. Where completion was to take place on possession being given and it was stated orally that the vendor would not give possession until other accommodation was obtained, there was no enforceable contract; it could not be implied that possession must be given, and therefore completion take place, in a reasonable time: *Johnson v Humphrey* [1946] 1 All ER 460, 90 Sol Jo 211.

8 If it is made so by the express terms of the contract, the nature of the property or the surrounding circumstances: see PARA 120 note 2 ante.

9 *Tilley v Thomas* (1867) 3 Ch App 61; *Lock v Bell* [1931] 1 Ch 35. As to the effect of non-completion on the day fixed on the liability to pay interest see PARAS 122 ante, 194 et seq post.

10 *Stickney v Keeble* [1915] AC 386 at 418, HL. See also PARA 120 ante. As to provisions in the standard conditions of sale for service of a notice to complete see PARA 122 ante.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### 185 Material dates for completion of the contract

NOTE 3--See *P & O Overseas Holdings Ltd v Rhys Braintree Ltd* [2002] EWCA Civ 296, [2002] All ER (D) 161 (Mar). Land Registration Act 1925 repealed and replaced by the Land Registration Act 2002; see LAND REGISTRATION.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (3) RIGHTS AND DUTIES WITH RESPECT TO THE PROPERTY/ (iii) Possession and the Vendor's Lien/186. Time for transfer of possession.

### 186. Time for transfer of possession.

The contract<sup>1</sup> may contain express provision showing that possession is to be given at a fixed date, even if the sale is not then otherwise completed<sup>2</sup>. Under such a provision the vendor may be required to give possession before the purchase money is paid<sup>3</sup>, or the purchaser to take possession before the vendor has made out his title<sup>4</sup>. Otherwise either party can insist on delivery of possession being treated as part of the completion of the contract<sup>5</sup>, and, in particular, the vendor is entitled to the actual possession of the property or the actual receipt of rents and profits<sup>6</sup> until the whole of the purchase money has been paid<sup>7</sup>.

1 As to the formation of the contract see PARAS 23-40 ante.

2 *Tilley v Thomas* (1867) 3 Ch App 61 at 66. As to occupation before completion see PARA 119 ante.

3 *Gedye v Duke of Montrose* (1858) 26 Beav 45.

4 See *Tilley v Thomas* (1867) 3 Ch App 61 at 66. Ordinarily, where possession is to be given at a specified date, this means that the vendor must then have shown such a title that possession can safely be taken: *Tilley v Thomas* supra at 66; and see *Boehm v Wood* (1820) 1 Jac & W 419. These matters are generally the subject of a special condition: see PARA 119 ante.

5 As to the completion of the contract see PARAS 262-325 post.

6 As to right of possession or to rents and profits see PARA 188 post; and as to the meaning of 'rents and profits' see PARA 189 post.

7 *Acland v Cuming, Gaisford v Acland* (1816) 2 Madd 28. As to the payment of interest on failure to complete on the day fixed for completion see PARAS 122 ante, 194 et seq post. As to what constitutes possession see REAL PROPERTY vol 39(2) (Reissue) PARA 167; and cf PERSONAL PROPERTY vol 35 (Reissue) PARA 1211. As to the meaning of 'vacant possession' see PARA 123 ante; and as to the possibility that more importance may be attached to vacant possession at a time of housing shortage, cf *Johnson v Humphrey* [1946] 1 All ER 460 at 463.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (3) RIGHTS AND DUTIES WITH RESPECT TO THE PROPERTY/ (iii) Possession and the Vendor's Lien/187. Vendor's lien.

#### 187. Vendor's lien.

The vendor's right to receive the purchase money is secured, first, by a lien upon the property<sup>1</sup>, and secondly, by his right, in the absence of express stipulation as to the time of delivering possession, to retain possession until the purchase money is paid<sup>2</sup>. The vendor's lien is a legal lien on the land and the title deeds or land certificate while in his possession, and in equity the lien subsists until actual payment<sup>3</sup>. In the case of unregistered land, the equitable lien is registrable under the Land Charges Act 1972, unless, presumably, the vendor retains custody of the title deeds<sup>4</sup>. In the case of registered land, the lien should be protected by an entry on the register, unless the vendor is in actual occupation, when the lien constitutes an overriding interest<sup>5</sup>. The lien exists whether the consideration is a sum in gross, an annuity for the vendor's life or a sum payable by instalments<sup>6</sup>, but no lien arises in favour of a vendor who agrees to sell in consideration of a life annuity to be secured by bond<sup>7</sup> or where the consideration is otherwise secured<sup>8</sup>. The vendor's lien is a charge upon the property subject to which a beneficiary under a will takes a property under a contract for sale uncompleted at the death of the testator<sup>9</sup>.

A person other than the purchaser who pays or provides the purchase money or any part of it may become entitled by subrogation to the vendor's lien<sup>10</sup>. This right arises only where it is the common intention of the purchaser and the third person that the money is used to pay the unpaid vendor<sup>11</sup>. The lien by subrogation is not available where the money is provided by a mortgage<sup>12</sup>, or where it is established that the true nature of the advance by the other person is merely an unsecured loan<sup>13</sup>.

1 See LIEN vol 68 (2008) PARA 859 et seq. As to the date when the vendor's right to receive the purchase money accrues for the purposes of the rules on limitation of actions see the Limitation Act 1980 s 20(1); and cf LIMITATION PERIODS vol 68 (2008) PARA 1112.

2 *Lysaght v Edwards* (1876) 2 ChD 499 at 506.

3 See LIEN vol 68 (2008) PARA 859.

4 See the Land Charges Act 1972 s 2(4) Class C(iii) (as amended); and LAND CHARGES vol 26 (2004 Reissue) PARA 631. The lien is not registrable under the Companies Act 1985 s 395 (as amended) (see COMPANIES vol 15 (2009) PARA 1279); see *London and Cheshire Insurance Co Ltd v Laplagrene Property Co Ltd* [1971] Ch 499, [1971] 1 All ER 766. See LIEN vol 68 (2008) PARA 860.

5 See *London and Cheshire Insurance Co Ltd v Laplagrene Property Co Ltd* [1971] Ch 499, [1971] 1 All ER 766; *Barclays Bank plc v Estates & Commercial Ltd* [1997] 1 WLR 415, 74 P & CR 30, CA; *UCB Bank plc v Beasley and French* [1995] NPC 144, CA; *Nationwide Anglia Building Society v Ahmed* (1995) 70 P & CR 381, CA. As to registered land generally see LAND REGISTRATION.

6 See LIEN vol 68 (2008) PARA 859.

7 *Dixon v Gayfer* (1857) 1 De G & J 655. Where land was agreed to be sold to a company in consideration of a rentcharge and before conveyance the rentcharge fell into arrear, the vendor had no lien on the land for the arrears: *Earl of Jersey v Briton Ferry Floating Dock Co* (1869) LR 7 Eq 409. On the other hand, where after conveyance the rentcharge fell into arrear, the vendor was allowed, notwithstanding the appointment of a receiver of the tolls, profits and income of the undertaking, to distrain for the arrears upon the land, both where a power to distrain was expressly given by the conveyance (*Eyton v Denbigh, Ruthin and Corwen Rly Co* (1868) LR 6 Eq 14), and where it arose under the Landlord and Tenant Act 1730 s 5 (*Eyton v Denbigh, Ruthin and Corwen Rly Co, Rickman v Johns* (1868) LR 6 Eq 488). As to the power of distress conferred by the Landlord and Tenant Act 1730 see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARAS 865, 870.

8 For a review of the authorities see *Barclays Bank plc v Estates & Commercial Ltd* [1997] 1 WLR 415 at 419-424, 74 P & CR 30 at 34-39, CA, per Millett LJ; and LIEN vol 68 (2008) PARA 884.

9 *Re Birmingham, Savage v Stannard* [1959] Ch 523, [1958] 2 All ER 397.

10 See eg *Boodle Hatfield & Co (a firm) v British Films Ltd* [1986] FLR 134, (1986) 136 NLJ 117; *Boscawen v Bajwa* [1995] 4 All ER 769, [1996] 1 WLR 328, CA; *Banque Financière de la Cité v Parc (Battersea) Ltd* [1998] 1 All ER 737, [1998] 2 WLR 475, HL; and LIEN vol 68 (2008) PARA 874.

11 *Orakpo v Manson Investments Ltd* [1978] AC 95, [1977] 3 All ER 1, HL.

12 *Burston Finance Ltd v Speirway Ltd* [1974] 3 All ER 735, [1974] 1 WLR 1648, disapproving *Coptic Ltd v Bailey* [1972] Ch 446, [1972] 1 All ER 1242.

13 *Paul v Speirway Ltd (in liquidation)* [1976] Ch 220, [1976] 2 All ER 587.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (3) RIGHTS AND DUTIES WITH RESPECT TO THE PROPERTY/ (iv) Rents, Profits, Receipts and Outgoings/188. Right to possession or to rents and profits.

### (iv) Rents, Profits, Receipts and Outgoings

#### 188. Right to possession or to rents and profits.

Although the vendor is entitled to possession or to receipt of rents and profits<sup>1</sup> until payment of the purchase money, his beneficial title does not extend beyond the time when completion ought to take place, that is, if no day is fixed for completion, the time when he first makes out his title, or, if a day is fixed for completion, then the day so fixed<sup>2</sup>. Until the proper time for completion, he occupies the property or receives the rents and profits for his own benefit<sup>3</sup>; after that time they belong to the purchaser<sup>4</sup>, and the vendor receives them until actual completion

as trustee for the purchaser and must account to him accordingly<sup>5</sup>. If the vendor is in occupation, he may be charged with an occupation rent<sup>6</sup>.

1 As to the meaning of 'rents and profits' see PARA 189 post.

2 As to the date for completion see PARAS 120, 185 ante; and as to the completion of the contract see PARAS 262-325 post.

3 *Garrick v Earl Camden* (1790) 2 Cox Eq Cas 231; *Cuddon v Tite* (1858) 1 Giff 395. On his death before the day for completion the intermediate rents formerly went to his heir or devisee (*Lumsden v Fraser* (1841) 12 Sim 263; and see *Watts v Watts* (1873) LR 17 Eq 217), but subject to the rights of his personal representatives.

4 *Paine v Meller* (1801) 6 Ves 349 at 352; *Monro v Taylor* (1848) 8 Hare 51 at 70 (affd (1852) 3 Mac & G 713); *De Visme v De Visme* (1849) 1 Mac & G 336 at 346; *Plews v Samuel* [1904] 1 Ch 464 at 468.

5 *M'Namara v Williams* (1801) 6 Ves 143; *Wilson v Clapham* (1819) 1 Jac & W 36; *Plews v Samuel* [1904] 1 Ch 464 at 468. The vendor is not entitled to retain rents received by him after the date for completion in satisfaction of rents accrued due before that date: *Plews v Samuel* supra. Where, on a sale of a business as a going concern, completion is delayed owing to the purchaser's default, the vendor is entitled to carry on the business at the purchaser's risk, but he must inform the purchaser of what he is doing: *Golden Bread Co Ltd v Hemmings* [1922] 1 Ch 162.

6 See PARA 191 post.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (3) RIGHTS AND DUTIES WITH RESPECT TO THE PROPERTY/ (iv) Rents, Profits, Receipts and Outgoings/189. Meaning of 'rents and profits'.

### 189. Meaning of 'rents and profits'.

For the purpose of the rule as to the right to receive rents and profits<sup>1</sup>, the rents and profits of the land include the rents of the land, and also all the profits accruing from the use or working of the land in the state in which it exists at the date of the contract<sup>2</sup>. Thus, if it is agricultural land, the vendor, as long as he is entitled to the profits, can get in and dispose of the crops in a proper course of husbandry and retain the proceeds for his own benefit<sup>3</sup>. If the land has an open mine or quarry upon it, the vendor, if the mine is let, takes the rents and royalties accruing due during the same period, notwithstanding that they represent part of the substance of the land, and, if it is not let but is being worked, he takes, apparently, for his own benefit the proceeds of working<sup>4</sup>.

However, the vendor is not entitled to take under the guise of profits what is in fact part of the inheritance, and the purchaser may obtain an injunction to prevent him doing anything likely to destroy or depreciate the property sold or to prevent the property being assured to the purchaser<sup>5</sup>, although where the vendor disputes the existence of an enforceable contract for sale such an injunction will not be granted unless the balance of convenience requires it<sup>6</sup>.

1 As to this rule see PARAS 188 ante, 190 post.

2 As to the formation of the contract see PARAS 23-40 ante; and as to the completion of the contract see PARAS 262-325 post.

3 See *Webster v Donaldson* (1865) 34 Beav 451.

4 *Leppington v Freeman* (1891) 66 LT 357, CA. In this respect the vendor and purchaser appear to be in the same position as lessor and lessee, or tenant for life impeachable for waste and remainderman: *Leppington v Freeman* supra; and see 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 548. Cf *Nelson v Bridges* (1839) 2 Beav 239, where a purchaser who had been let into possession of quarries and was wrongfully evicted by the vendor was entitled to the proceeds of the quarries from the time of his first possession. As to mining royalties see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 365. On the sale of a manor the vendor took fines accruing due on admittances before the proper day for completion (*Cuddon v Tite* (1858) 1 Giff 395), and, perhaps, where the event causing the change of tenant was prior to the day for completion, even though the admittance was after that day (*Garrick v Earl Camden* (1790) 2 Cox Eq Cas 231): see 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 557 note (m).

5 *Spiller v Spiller* (1819) 3 Swan 556, explained in *Hadley v London Bank of Scotland Ltd* (1865) 3 De GJ & Sm 63 at 70-71 per Turner LJ. See also *Echliiff v Baldwin* (1809) 16 Ves 267; *Curtis v Marquis of Buckingham* (1814) 3 Ves & B 168; *Shrewsbury and Chester Rly Co v Shrewsbury and Birmingham Rly Co* (1851) 15 Jur 548 at 550; *London and County Banking Co v Lewis* (1882) 21 ChD 490, CA; *Phillips v Lamdin* [1949] 2 KB 33, [1949] 1 All ER 770 (order for restoration of property). As to the destruction of ornamental timber see *Magennis v Fallon* (1828) 2 Mol 561 at 590 (repudiation where material alteration in the property sold).

6 *Turner v Wight* (1841) 4 Beav 40; *Hadley v London Bank of Scotland Ltd* (1865) 3 De GJ & Sm 63 at 70-71. See also CIVIL PROCEDURE vol 11 (2009) PARA 469.

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### 190. Rights of purchaser in possession.

If the purchaser is let into possession before the proper time for completion<sup>1</sup>, then, unless the contract otherwise provides, he is entitled to the rents and profits<sup>2</sup> from the time of taking possession<sup>3</sup>, he is entitled to do all acts ordinarily incident to an estate in possession, and is entitled to gather crops or cut underwood in a proper course of husbandry in the same way as a tenant for life<sup>4</sup>. As, however, the vendor is still entitled to a lien on the estate for his purchase money<sup>5</sup>, the purchaser may not do any acts which tend to depreciate the vendor's security for his money, such as cutting timber or otherwise committing waste<sup>6</sup>, and, except where the amount of depreciation threatened leaves the vendor with an adequate security for the amount unpaid, he may obtain an injunction to restrain such acts<sup>7</sup>.

1 As to occupation before completion see PARA 119 ante.

2 As to the meaning of 'rents and profits' see PARA 189 ante.

3 *Powell v Martyr* (1803) 8 Ves 146 at 148; *Fludyer v Cocker* (1805) 12 Ves 25; *A-G v Dean and Chapter of Christ-Church, Oxford, ex p Maddock* (1842) 13 Sim 214; *Birch v Joy* (1852) 3 HL Cas 565 at 591; *Ballard v Shutt* (1880) 15 ChD 122, where the purchaser was held liable for interest from the date when he exercised certain acts of ownership over the land, although under the circumstances there were no rents and profits received by him; *Leppington v Freeman* (1891) 66 LT 357, CA; *Fletcher v Lancashire and Yorkshire Rly Co* [1902] 1 Ch 901 at 908.

4 *Burroughs v Oakley* (1819) 3 Swan 159 at 170; cf *Poole v Shergold* (1786) 1 Cox Eq Cas 273. See also SETTLEMENTS vol 42 (Reissue) PARA 986.

5 See *Smith v Hibbard* (1789) 2 Dick 730; *Ecclesiastical Comrs v Pinney* [1899] 2 Ch 729 at 735; and PARA 187 ante.

6 *Crockford v Alexander* (1808) 15 Ves 138, where it was said that the vendor is in the situation of an equitable mortgagee. As to waste see CIVIL PROCEDURE vol 11 (2009) PARAS 439-441; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 431-435; SETTLEMENTS vol 42 (Reissue) PARA 986 et seq.

7 See *Humphreys v Harrison* (1820) 1 Jac & W 581; *Hippesley v Spencer* (1820) 5 Madd 422; *King v Smith* (1843) 2 Hare 239. These cases were all between mortgagee and mortgagor in possession. As to injunctions generally see CIVIL PROCEDURE vol 11 (2009) PARA 331 et seq.

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#### 191. Rents and profits to be taken into account.

Under the ordinary judgment requiring a vendor to account for rents and profits<sup>1</sup> from the proper time for completion<sup>2</sup>, he is chargeable only with rents and profits actually received by him or by other persons for his use<sup>3</sup>. However, if it is proved that rents and profits have not been received owing to neglect or improper conduct on the part of the vendor, the order is that he must account for rents and profits received or which, but for his wilful neglect or default, might have been received by him<sup>4</sup>.

If it appears that he has been in occupation of the property, a direction may be given that he is to be charged with an occupation rent<sup>5</sup>. An occupation rent is usually allowed if the possession has been beneficial to the vendor<sup>6</sup>, but not if the vendor has against his own wish been compelled to remain in possession of business premises<sup>7</sup>.

1 As to the meaning of 'rents and profits' see PARA 189 ante.

2 As to the time for completion see PARAS 120, 185 ante.

3 *Howell v Howell* (1837) 2 My & Cr 478 at 486. See the form of judgment in 3 Seton's Form of Decrees, Judgments and Orders in Equity (7th Edn, 1912) 2170. This is the usual form in cases of account of rents and profits except as against a mortgagee in possession, who is always charged on the footing of wilful default (see MORTGAGE vol 77 (2010) PARA 428 et seq), and a trustee against whom a breach of trust is proved (see TRUSTS vol



48 (2007 Reissue) PARA 1099). An unpaid vendor, since he has a lien on the land, is in a position analogous to that of a mortgagee in possession, but it seems that he is not, merely on that ground, chargeable on the footing of wilful default: *Sherwin v Shakspear* (1854) 5 De GM & G 517 at 531-532; *Regent's Canal Co v Ware* (1857) 23 Beav 575 at 588. In *Phillips v Silvester* (1872) 8 Ch App 173, which seems to lay down a contrary rule, there was in fact wilful default: see EQUITY vol 16(2) (Reissue) PARAS 451, 611. A vendor of a farm is charged with the proceeds of crops actually realised, subject to deduction of expenses of realisation, but under the ordinary judgment he is not allowed losses incurred in farming: *Bennett v Stone* [1902] 1 Ch 226; affd [1903] 1 Ch 509, CA.

4 *Howell v Howell* (1837) 2 My & Cr 478. See 3 Seton's Form of Decrees, Judgments and Orders in Equity (7th Edn, 1912) 2173. This is done, for instance, where the vendor has, by his neglect, allowed the rents to fall into arrear (see *Wilson v Clapham* (1819) 1 Jac & W 36; and *Acland v Cuming*, *Gaisford v Acland* (1816) 2 Madd 28, where the account was specifically directed to arrears of rent), or, apparently, where he omits, without the purchaser's assent, to relet on a yearly tenancy agricultural land which falls vacant before completion (see *Earl of Egmont v Smith*, *Smith v Earl of Egmont* (1877) 6 ChD 469). The fact that the vendor, in common with other landowners in the neighbourhood, has reduced the rents, there being nothing to show that this was not done in the ordinary course of management by a prudent owner, is, however, not a ground for an order to account on the footing of wilful default (*Sherwin v Shakspear* (1854) 5 De GM & G 517); nor is it wilful default to allow a tenant to continue at a low rent when the purchaser has not required him to be turned out (*Crosse v Duke of Beaufort* (1851) 5 De G & Sm 7).

5 See 3 Seton's Form of Decrees, Judgments and Orders in Equity (7th Edn, 1912) 2178; and *Dyer v Hargrave*, *Hargrave v Dyer* (1805) 10 Ves 505 at 511. In order to charge the vendor with an occupation rent the judgment must be specially framed (see *Bennett v Stone* [1902] 1 Ch 226 at 237, where it was stated that an occupation rent might be charged under a decree on the footing of wilful default), but wilful default is not appropriate to the case of a vendor continuing in occupation, and the judgment should specially refer to that circumstance (see *Sherwin v Shakspear* (1854) 5 De GM & G 517 at 539; *Krehl v Park* (1874) 31 LT 325).

6 *Sherwin v Shakspear* (1854) 5 De GM & G 517; *Metropolitan Rly Co v Defries* (1877) 2 QBD 189 (on appeal (1877) 2 QBD 387); *Halkett v Earl of Dudley* [1907] 1 Ch 590.

7 *Leggott v Metropolitan Rly Co* (1870) 5 Ch App 716.

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### 192. Payments accruing due between contract and completion.

Where land is sold subject to a lease which terminates at a date between contract and completion or even on the date fixed for completion<sup>1</sup>, and the sale is with vacant possession, the vendor is entitled to any sum paid in respect of dilapidations at the end of the term<sup>2</sup>. The same rule applied where between the date of contract and completion property was requisitioned<sup>3</sup> and a payment was made in respect of damage during the requisition<sup>4</sup>.

<sup>1</sup> As to the formation of the contract see PARAS 23-40 ante; as to the completion of the contract see PARAS 262-325 post. As to the date of completion see PARAS 120, 185 ante.

2 *Re Lyne-Stephens and Scott-Miller's Contract* [1920] 1 Ch 472, CA. The position may be different if the sale is subject to and with the benefit of the lease: *Re Lyne-Stephens and Scott-Miller's Contract* supra at 486.

3 See COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 501; and WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 509. As to requisitions see PARAS 102-108 ante.

4 *Re Hamilton-Snowball's Conveyance* [1959] Ch 308, [1958] 2 All ER 319. Cf *Re Armitage's Contract, Armitage v Inkpen* [1949] Ch 666, [1949] LJR 1511, where the matter was subject to a special condition. As to special conditions see PARAS 76-77 ante.

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### 193. Vendor's liability for outgoings.

In a formal contract it is usually provided that the vendor is to pay all the outgoings until the day fixed for completion, and that for this purpose all necessary apportionments are to be made<sup>1</sup>. In the absence of any such stipulation the vendor must, for the period during which he is entitled to take the rents and profits for his own benefit<sup>2</sup>, bear all outgoings<sup>3</sup>, and of those which are current at the end of the period and are legally apportionable he bears the part attributable to the period<sup>4</sup>.

1 For the meaning of 'outgoings' see PARA 125 ante. As to apportionment see PARA 125 et seq ante. As to the formation of the contract see PARAS 23-40 ante; and as to the completion of the contract see PARAS 262-325 post. As to the date of completion see PARAS 120, 185 ante.

2 I.e. until the proper date for completion: see PARA 185 ante. As to the meaning of 'rents and profits' see PARA 189 ante.

3 *Carrodus v Sharp* (1855) 20 Beav 56. See also *Golden Bread Co Ltd v Hemmings* [1922] 1 Ch 162. As to a vendor's liability for war damage contributions under the legislation subsequently embodied in the War Damage Act 1943 ss 36, 39, 45, 66 (all repealed) see *Re Jacobs' and Stedman's Contract* [1942] Ch 400, [1942] 2 All ER 104; *Re Watford Corp'n's and Ware's Contract* [1943] Ch 82, [1943] 1 All ER 54, where the purchase price was payable by instalments; and PARA 128 ante. As to the wartime emergency legislation see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 505 et seq.

4 See PARA 124 note 2 ante.

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Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (3) RIGHTS AND DUTIES WITH RESPECT TO THE PROPERTY/ (v) Interest on Purchase Money/194. Vendor's right to interest.

## **(v) Interest on Purchase Money**

### **194. Vendor's right to interest.**

As a general rule, as soon as the vendor ceases to be entitled to receive the rents and profits<sup>1</sup> for his own benefit, he becomes entitled to interest on the unpaid purchase money until actual payment<sup>2</sup>. The right to interest may be either an implied or an express term of the contract<sup>3</sup>.

1 As to the meaning of 'rents and profits' see PARA 189 ante.

2 See *Burton v Todd*, *Todd v Gee* (1818) 1 Swan 255 at 260; *Leggott v Metropolitan Rly Co* (1870) 5 Ch App 716 at 719; *Toronto City Corp v Toronto Rly Corp* [1925] AC 177, PC (compulsory purchase). The rule applies generally, and is not confined to the sale of land: *International Rly Co v Niagara Parks Commission* [1941] AC 328 at 344-345, [1941] 2 All ER 456 at 463-464, PC. Interest is not payable on the deposit: *Bridges v Robinson* (1811) 3 Mer 694. The purchaser, however, pays interest on purchase money which he retains to meet incumbrances: *Hughes v Kearney* (1803) 1 Sch & Lef 132 at 134.

3 As to the case where the right to interest is an express term of the contract or conditions of sale see PARA 122 ante; and as to the contents of the written contract see PARA 34 ante.

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### **195. Interest when time for completion is not fixed.**

Where the contract is silent as to the time for completion and payment of interest, interest is payable from the time when the vendor has so made out his title that the purchaser could safely take possession<sup>1</sup>. When the title is proved in an action for specific performance, interest runs from the date of the master's order that a good title has been made out<sup>2</sup>. The rate of interest formerly allowed was 4 per cent per annum<sup>3</sup>, but it now seems that more realistic rates will be awarded<sup>4</sup>. These principles also apply in the case of land acquired compulsorily under statutory powers, and interest at the appropriate rate is normally payable from the date when the vendor makes out his title<sup>5</sup>, but not before the purchase money has been ascertained<sup>6</sup>.

Where an acquiring authority is entitled to enter on the land before completion<sup>7</sup>, interest runs from the date of entry<sup>8</sup>, at a rate prescribed by statutory regulations<sup>9</sup>.

If the purchaser is let into possession, either immediately at the date of the contract or subsequently, interest begins to run on the unpaid purchase money from the time of possession, unless otherwise agreed<sup>10</sup>. If he is already in possession as tenant, it runs from the date of the contract, and he is from that date entitled to the rents and profits<sup>11</sup>.

1 *Carrodus v Sharp* (1855) 20 Beav 56 at 58; *Wells v Maxwell (No 2)* (1863) 32 Beav 550; *Re Pigott and Great Western Rly Co* (1881) 18 ChD 146 at 150; *Re Keeble and Stillwell's Fletton Brick Co* (1898) 78 LT 383 at 384. See also *Binks v Lord Rokeby* (1818) 2 Swan 222 at 226. As to the payment of interest where the contract or conditions expressly provide for it see PARA 122 ante; and as to completion of the contract see PARAS 262-325 post.

2 *Halkett v Earl of Dudley* [1907] 1 Ch 590. See also *Pincke v Curteis* (1793) 4 Bro CC 333n (Belt's Edn); and *Enraght v Fitzgerald* (1839) 2 I Eq R 87. As to specific performance see PARAS 247-253 post; and SPECIFIC PERFORMANCE. As to the master's order (formerly the master's certificate) see CPR Sch 1 RSC Ord 44 r 11. As to the CPR see PARA 133 note 1 ante.

3 See eg *Calcraft v Roebuck* (1790) 1 Ves 221 at 226; *Halkett v Earl of Dudley* [1907] 1 Ch 590 at 606; *Re Davy, Hollingsworth v Davy* [1908] 1 Ch 61, CA. As to interest see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1303 et seq.

4 See eg *Wallersteiner v Moir (No 2)* [1975] QB 373, [1975] 1 All ER 849, CA, where interest at 1% above minimum lending rate was awarded against a fiduciary. It would appear that the same principle could apply to the sale of land: see *Wallersteiner v Moir (No 2)* supra at 399 and 865 per Buckley LJ. See also *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515 at 546-547, [1980] 2 All ER 92 at 97-98 per Brightman LJ. The matter is now usually provided for in conditions of sale: see the Standard Conditions of Sale (3rd Edn), condition 1.1.1(g); and PARA 119 note 7 ante. As to the Standard Conditions of Sale see PARA 1 note 9 ante.

5 *Re Pigott and Great Western Rly Co* (1881) 18 ChD 146. See also COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 552.

6 *Catling v Great Northern Rly Co* (1869) 18 WR 121 at 122. In *Re Eccleshill Local Board* (1879) 13 ChD 365, it was held that interest ran as soon as the purchase price was ascertained, but, although this is the earliest possible date, interest does not necessarily then commence: see *Re Pigott and Great Western Rly Co* (1881) 18 ChD 146 at 154.

7 See COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 638 et seq.

8 See COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARAS 645, 745.

9 The regulations are made under the Land Compensation Act 1961 s 32: see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 641.

10 *Fludyer v Cocker* (1805) 12 Ves 25; *Powell v Martyr* (1803) 8 Ves 146 at 148. See also *Portman v Mill* (1839) 3 Jur 356; *Beresford v Clarke* [1908] 2 IR 317; *Glasgow and South Western Rly Co v Greenock Port and Harbour Trustees* [1909] WN 152, HL; and *Re Cassano and Mackay's Contract* [1920] WN 7. A purchaser who obtains possession before completion without the vendor's consent and without any provision in the contract authorising him to do so, is a mere trespasser: *Crockford v Alexander* (1808) 15 Ves 138. As to the position under conditions of sale see PARA 119 ante.

11 *Townley v Bedwell* (1808) 14 Ves 591 at 597; *Daniels v Davison* (1809) 16 Ves 249 at 253; cf *Mills v Haywood* (1877) 6 ChD 196. The contract for purchase does not necessarily effect a surrender of the tenancy (see PARA 127 ante), although in equity the tenant has the ordinary rights of a purchaser, subject always to the terms of the contract, express or implied: *Daniels v Davison* supra; and see *Raffety v Schofield* [1897] 1 Ch 937. However, a mere tenancy at will is determined by the contract: *Daniels v Davison* supra at 252.

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### **196. Interest when time for completion is fixed.**

When the contract fixes a time for completion<sup>1</sup>, but is silent as to the payment of interest, interest at the appropriate rate<sup>2</sup> is as a general rule payable as from the date so fixed<sup>3</sup>. However, if the delay in completion is caused by the vendor<sup>4</sup>, he is not allowed to profit by his own default, and, if the interest exceeds the rents and profits<sup>5</sup>, he takes the rents and profits, and interest does not run until he is ready to give a good title to the purchaser, or until the purchaser may first safely take possession<sup>6</sup>. If the contract, although silent as to interest, gives the vendor the rents and profits until a specified date, any implied right to interest during the same period is excluded<sup>7</sup>.

1 As to the formation of the contract see PARAS 23-40 ante; and as to the completion of the contract see PARAS 262-325 post. As to the date of completion see PARAS 120, 185 ante.

2 As to this rate see PARA 195 text and notes 3-4 ante.

3 *Calcraft v Roebuck* (1790) 1 Ves 221 at 226; *Acland v Cuming, Gaisford v Acland* (1816) 2 Madd 28; *Esdaile v Stephenson* (1822) 1 Sim & St 122 at 123; *Grove v Bastard* (1851) 1 De GM & G 69 at 79; *Collard v Roe* (1859) 4 De G & J 525; *Catling v Great Northern Rly Co* (1869) 21 LT 17 at 19 (revsd on the facts 21 LT 769). See also *Monro v Taylor* (1852) 3 Mac & G 713 at 725.

4 As to delay in completion see PARA 121 ante.

5 As to rents and profits see PARAS 188-193 ante.

6 *Pincke v Curteis* (1793) 4 Bro CC 329; *Esdaile v Stephenson* (1822) 1 Sim & St 122; *Paton v Rogers* (1822) 6 Madd 256 at 257; *Jones v Mudd* (1827) 4 Russ 118. Under the earlier practice interest was charged more strictly against the purchaser: see *Burton v Todd, Todd v Gee* (1818) 1 Swan 255 at 260; *Wilson v Clapham* (1819) 1 Jac & W 36 at 38. Where under a stipulation in the contract a vendor elects to take interest in lieu of rents, he is not at liberty, as against the purchaser, to allocate any part of those rents to arrears of rents due to himself from tenants either at the date of the contract or subsequently before the day fixed for completion: *Plews v Samuel* [1904] 1 Ch 464.

7 See *Brooke v Champenowne* (1837) 4 Cl & Fin 589 at 611, HL.

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### 197. Appropriation to meet purchase money.

Where there is no express agreement for the payment of interest, the purchaser, if he is not responsible for the delay, can avoid payment of interest by appropriating money to meet the purchase money<sup>1</sup>, and giving notice of the appropriation to the vendor<sup>2</sup>. The money should either be placed on deposit<sup>3</sup>, or otherwise kept available at the purchaser's bank<sup>4</sup>. This does not interfere with the purchaser's right to the rents and profits<sup>5</sup>, but any interest which is actually made by the money belongs to the vendor<sup>6</sup>.

1 See *Powell v Martyr* (1803) 8 Ves 146; *Dyson v Hornby, ex p Markwell* (1851) 4 De G & Sm 481 at 484; *Regent's Canal Co v Ware* (1857) 23 Beav 575 at 587. Cf *Howland v Norris* (1784) 1 Cox Eq Cas 59, where the purchaser was allowed compensation in respect of the time down to which the purchase money was unproductive. See also *Bennett v Stone* [1903] 1 Ch 509 at 524, CA. As to appropriation where the payment of interest is provided for see PARA 122 ante.

2 Notice to the vendor is essential: *Powell v Martyr* (1803) 8 Ves 146. The effect of the appropriation is only to stop interest; the money remains at the purchaser's risk: *Roberts v Massey* (1807) 13 Ves 561. But if the vendor is in default, interest does not run (see PARA 122 ante), so that appropriation seems only to be necessary where there is delay for which neither vendor nor purchaser is to blame.

3 See *Kershaw v Kershaw* (1869) LR 9 Eq 56.

4 *Dyson v Hornby, ex p Markwell* (1851) 4 De G & Sm 481 at 484. However, interest does not stop as to any part of the sum which is in fact used for the purpose of maintaining the purchaser's usual credit balance: *Winter v Blades* (1825) 2 Sim & St 393.

5 *Regent's Canal Co v Ware* (1857) 23 Beav 575 at 587. As to rents and profits see PARAS 188-193 ante.

6 *Dyson v Hornby, ex p Markwell* (1851) 4 De G & Sm 481 at 485; *Kershaw v Kershaw* (1869) LR 9 Eq 56; *Re Golds' and Norton's Contract* (1885) 33 WR 333.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (4) ASSIGNMENT AND DEVOLUTION OF RIGHTS/(i) Assignment of Rights/198. Disposition by the purchaser.

## (4) ASSIGNMENT AND DEVOLUTION OF RIGHTS

### (i) Assignment of Rights

#### 198. Disposition by the purchaser.

Upon the making of an enforceable contract for sale<sup>1</sup> the purchaser becomes the owner of the land in equity<sup>2</sup>, and can dispose of his equitable interest to a third person<sup>3</sup>.

1 As to the formation of the contract see PARAS 23-40 ante; and as to the completion of the contract see PARAS 262-325 post.

2 As to the effect of a contract for sale see PARA 177 ante.

3 *Paine v Meller* (1801) 6 Ves 349 at 352; and see PARA 177 ante. Such dispositions are usually made by subsale.

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Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (4) ASSIGNMENT AND DEVOLUTION OF RIGHTS/(i) Assignment of Rights/199. Disposition by the vendor.

#### 199. Disposition by the vendor.

Since the vendor becomes a trustee for the purchaser<sup>1</sup>, he is not entitled to dispose of the property to any person other than the purchaser. Where there is a clear contract for sale, any such intended disposition entitles the purchaser to an injunction to prevent the disposition from being carried into effect<sup>2</sup>, and if it has been validly carried into effect, the purchaser can forthwith sue the vendor for damages on the ground that the vendor has incapacitated himself from performing the contract<sup>3</sup>.

1 See PARA 177 ante.

2 *Hadley v London Bank of Scotland Ltd* (1865) 3 De GJ & Sm 63 (confining *Spiller v Spiller* (1819) 3 Swan 556 (where Lord Eldon LC stated that in general the purchaser was not entitled to an injunction) to cases of doubt as to the contract being enforceable). See *Echcliff v Baldwin* (1809) 16 Ves 267; *Curtis v Marquis of Buckingham* (1814) 3 Ves & B 168; and CIVIL PROCEDURE vol 11 (2009) PARA 469. The original contract must be specifically enforceable: *Goodwin v Fielding* (1853) 4 De GM & G 90; *De Hoghton v Money* (1866) 2 Ch App 164. See also *Potter v Sanders* (1846) 6 Hare 1; and *Trinidad Asphalt Co v Coryat* [1896] AC 587, PC.

3 *Main's Case* (1596) 5 Co Rep 20 b; *Lovelock v Franklyn* (1846) 8 QB 371. See also *Synge v Synge* [1894] 1 QB 466 at 471, CA, per Kay LJ. A dictum of Moulton LJ in *Re Taylor, ex p Norvell* [1910] 1 KB 562 at 573, CA, affirming the vendor's right of transfer, seems erroneous if taken literally. See also CONTRACT vol 9(1) (Reissue) PARAS 1000-1001; DAMAGES vol 12(1) (Reissue) PARA 1059. The purchaser could by registration protect his contract as against an alienee from the vendor (see PARAS 179 ante, 200 post); but the purchaser's failure to register does not give the vendor a defence to an action for damages (see *Hollington Bros Ltd v Rhodes* [1951] 2 All ER 578n, [1951] WN 437; and *Wright v Dean* [1948] Ch 686, [1948] 2 All ER 415), nor to an action for breach of trust (see *Lake v Bayliss* [1974] 2 All ER 1114, [1974] 1 WLR 1073). As to the possibility of a claim by the purchaser against his solicitor for negligence in failing to register see *Midland Bank Trust Co Ltd v Hett, Stubbs and Kemp (a firm)* [1979] Ch 384, [1978] 3 All ER 571; and PARA 179 note 7 ante.

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Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (4) ASSIGNMENT AND DEVOLUTION OF RIGHTS/(i) Assignment of Rights/200. Position of an alienee from the vendor.

## **200. Position of an alienee from the vendor.**

The position of an alienee to whom the vendor alienates the property after he has entered into an enforceable contract with the purchaser is governed by statutory provisions<sup>1</sup>. In the case of unregistered land, these enable an estate contract to be registered by the purchaser<sup>2</sup> and, whether or not the alienee from the vendor searches the register, make registration notice to him of the purchaser's contract<sup>3</sup>, so that if the contract is registered, the second alienee cannot be a purchaser without notice. On the other hand, if the contract is not registered it is void against the second alienee if he is a purchaser of the legal estate for money or money's worth<sup>4</sup>, and he is not prejudicially affected by any notice which he may have of it<sup>5</sup>.

<sup>1</sup> See the Law of Property Act 1925 s 198(1) (as amended) (see LAND CHARGES vol 26 (2004 Reissue) PARA 616); and the Land Charges Act 1972 s 2(4) (as amended) Class C(iv) (see LAND CHARGES vol 26 (2004 Reissue) PARA 632). As to the creation and enforcement of contracts see the Land Registration Act 1925 s 107(1); and LAND REGISTRATION.

<sup>2</sup> As to estate contracts see the Land Charges Act 1972 s 2(4) (as amended) Class C(iv); and LAND CHARGES vol 26 (2004 Reissue) PARA 632. Registration must be in the name of the legal estate owner whose land is affected (Land Charges Act 1972 s 3(1) (see LAND CHARGES vol 26 (2004 Reissue) PARA 639)), and therefore, where there is a subsale, the sub-purchaser's contract must be registered in the name of the head vendor (*Barrett v Hilton Developments Ltd* [1975] Ch 237, [1974] 3 All ER 944, CA (see LAND CHARGES vol 26 (2004 Reissue) PARA 609)).

<sup>3</sup> See PARA 21 ante; and EQUITY vol 16(2) (Reissue) PARA 577; LAND CHARGES vol 26 (2004 Reissue) PARA 616. In favour of a purchaser or intending purchaser, an official certificate of search is conclusive: see the Land Charges Act 1972 s 10(4); and LAND CHARGES vol 26 (2004 Reissue) PARA 701.

<sup>4</sup> See LAND CHARGES vol 26 (2004 Reissue) PARA 643.

<sup>5</sup> See *Midland Bank Trust Co Ltd v Green* [1981] AC 513, [1981] 1 All ER 153, HL; and EQUITY vol 16(2) (Reissue) PARA 577; LAND CHARGES vol 26 (2004 Reissue) PARA 616. As to the protection of a purchaser of registered land against matters not entered on the register see LAND REGISTRATION vol 26 (2004 Reissue) PARA 889 et seq. A purchaser under an uncompleted contract who is in actual occupation has an overriding interest: *Bridges v Mees* [1957] Ch 475, [1957] 2 All ER 577; and see LAND REGISTRATION vol 26 (2004 Reissue) PARA 1021.

## **UPDATE**

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## **200 Position of an alienee from the vendor**



NOTE 1--Land Registration Act 1925 repealed and replaced by the Land Registration Act 2002; see LAND REGISTRATION.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (4) ASSIGNMENT AND DEVOLUTION OF RIGHTS/(i) Assignment of Rights/201. Transfer of benefit of contract.

### 201. Transfer of benefit of contract.

Unless the contract provides to the contrary<sup>1</sup>, either party may dispose of the benefit of the contract in favour of another person<sup>2</sup>, either by way of absolute assignment of the whole contract, or of partial assignment, where, for instance, the contract is charged in favour of another<sup>3</sup>, or by an assignment of the contract as to part of the property. The assignee may enforce the contract against the other party to it in an action for specific performance<sup>4</sup>, provided that he assumes the position of his assignor and either fulfils or secures the fulfilment of all his liabilities under the contract<sup>5</sup>.

The assignee may sue in his own name if the other party has recognised the assignment so as to effect a novation of the contract<sup>6</sup>, or if the assignment is of the entire contract<sup>7</sup> and fulfils certain statutory requirements<sup>8</sup>. Otherwise he must either sue in the name of the assignor or make the assignor a party<sup>9</sup>. The assignor remains liable to be sued on the contract unless by novation the assignee has been substituted in his place<sup>10</sup>. Apart from the statutory notice<sup>11</sup>, notice of assignment should be given to the other party to the contract, so that he may shape his course of action accordingly<sup>12</sup>.

1 Where the contract provides that the benefit is not to be assigned, any purported assignment is invalid: *Helstan Securities Ltd v Hertfordshire County Council* [1978] 3 All ER 262, 76 LGR 735; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL; *Don King Productions Inc v Warren* [1998] 2 All ER 608, [1998] 2 Lloyd's Rep 176 (affd [1999] 2 All ER 218, CA). A prohibition on assignment does not necessarily preclude a declaration of trust: *Don King Productions Inc v Warren* supra. As to limited restrictions on assignment see the Standard Conditions of Sale (3rd Edn), conditions 8.2.5, 8.3.3. As to the Standard Conditions of Sale see PARA 1 note 9 ante.

2 *Wood v Griffith* (1818) 1 Swan 43 at 55-56; *Shaw v Foster* (1872) LR 5 HL 321 at 349-350; *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1903] AC 414 at 420, HL; *Dawson v Great Northern and City Rly Co* [1905] 1 KB 260 at 270, CA. The right to make a contract by acceptance of an offer is not assignable: see *Meynell v Surtees* (1854) 3 Sm & G 101 at 116-117 (affd (1855) 25 LJ Ch 257); and CHOSER IN ACTION vol 13 (2009) PARA 14 et seq.

3 See *Browne v London Necropolis and National Mausoleum Co* (1857) 6 WR 188; and *Durham Bros v Robertson* [1898] 1 QB 765, CA.

4 As to specific performance see PARAS 247-253 post; and SPECIFIC PERFORMANCE.

5 *Dyer v Pulteney* (1740) Barn Ch 160 at 169-170; *Shaw v Foster* (1872) LR 5 HL 321 at 350, 354 per Lord O'Hagan; *Manchester Brewery Co v Coombs* [1901] 2 Ch 608 at 616. See also *Crabtree v Poole* (1871) LR 12 Eq 13.

6 As to novation see CONTRACT vol 9(1) (Reissue) PARAS 1036-1042. As to whether a subpurchaser may sue the original vendor where there has been no assignment of the head contract see *Berkley v Poulett* (1976) 120 Sol Jo 836, CA. As to the registration of the contract for a subsale see PARA 200 note 2 ante.

7 See *Forster v Baker* [1910] 2 KB 636, CA. As to transfer of rights and remedies see CHOSER IN ACTION vol 13 (2009) PARAS 81-82; and as to assignee's right to sue see CHOSER IN ACTION vol 13 (2009) PARA 68.

8 Ie the Law of Property Act 1925 s 136(1): see *Torkington v Magee* [1902] 2 KB 427, DC (revsd on another ground [1903] 1 KB 644, CA); and see CHOSER IN ACTION vol 13 (2009) PARA 72 et seq.

9 *Nelthorpe v Holgate* (1844) 1 Coll 203 at 217; *Durham Bros v Robertson* [1898] 1 QB 765 at 769-770, CA, per Chitty LJ. This may not, however, be necessary if there are no equities subsisting between the original parties to the contract and no suggestion of any reason for making the original contractor a party: *Manchester Brewery Co v Coombs* [1901] 2 Ch 608 at 617; but see *Warner Bros Records Inc v Rollgreen Ltd* [1976] QB 430, [1975] 2 All ER 105, CA; and *Three Rivers District Council v Bank of England* [1996] QB 292, [1995] 4 All ER 312, CA.

10 *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd, Associated Portland Cement Manufacturers (1900) Ltd v Tolhurst* [1902] 2 KB 660 at 668, CA, per Collins MR; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 103, [1993] 3 All ER 417 at 427 per Lord Browne-Wilkinson, HL. See also *Holden v Hayn and Bacon* (1815) 1 Mer 47; *Chadwick v Maden* (1851) 9 Hare 188; and *Fenwick v Bulman* (1869) LR 9 Eq 165 at 168. As to the assignment of contracts generally see CHOSER IN ACTION vol 13 (2009) PARA 14 et seq; and as to parties to an action for specific performance see SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 911 et seq.

11 *Ie* under the Law of Property Act 1925 s 136(1): see note 8 *supra*.

12 *Shaw v Foster* (1872) LR 5 HL 321 at 339 per Lord Cairns. Notice to the other party is essential in order to make the assignee's title effective against that other party and third persons: see *Warner Bros Records Inc v Rollgreen Ltd* [1976] QB 430, [1975] 2 All ER 105, CA; and CHOSER IN ACTION vol 13 (2009) PARA 41.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

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Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (4) ASSIGNMENT AND DEVOLUTION OF RIGHTS/ (ii) Death or Change in Position of Parties/A. DEATH/202. Contract not avoided by death.

## (ii) Death or Change in Position of Parties

### A. DEATH

#### 202. Contract not avoided by death.

A valid and enforceable contract for the sale of land<sup>1</sup> is not avoided by the death of either or both parties before completion<sup>2</sup>, but remains enforceable both at law and in equity by and against the personal representatives of the party or parties so dying<sup>3</sup>.

1 As to the formation of the contract see PARAS 23-40 *ante*.

2 As to completion of the contract see PARAS 262-325 *post*.

3 Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 177; *Roberts v Marchant* (1843) 1 Ph 370; *Hoddel v Pugh* (1864) 33 Beav 489. As to the form in which the vendor's interest passes see *A-G v Day* (1749) 1 Ves Sen 218 at 220 per Lord Hardwicke LC; and EQUITY vol 16(2) (Reissue) PARA 713. The personal representatives can carry out the sale under their general powers over the real and leasehold estate of the deceased; and in exercising the power under the Administration of Estates Act 1925, it is sufficient if the executors to whom probate is granted join in the sale: see EXECUTORS AND ADMINISTRATORS. As to a vendor who has received the purchase money before his death see *Re Pagani, Re Pagani's Trust* [1892] 1 Ch 236, CA; para 178 note 7 *ante*; and EXECUTORS AND ADMINISTRATORS.

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**203. Parties to action on vendor's death.**

In proceedings by or against the vendor's personal representatives for specific performance of the contract<sup>1</sup>, the vendor's heir or devisee was formerly a necessary party, since he was interested in the question whether the contract was enforceable or not<sup>2</sup>. The devisee<sup>3</sup> is still a proper party, if the executor has assented<sup>4</sup> to the devise to him, but if there has been no assent, only the executor should be a party and the devisee should not be joined except by court order<sup>5</sup>. If the vendor died intestate, only his administrator is a party.

1 As to specific performance see PARAS 247-253 post; and SPECIFIC PERFORMANCE.

2 *Roberts v Marchant* (1843) 1 Ph 370.

3 Since 1925 there is in general no descent to the heir: see the Administration of Estates Act 1925 s 45(1) (a); and EXECUTORS AND ADMINISTRATORS.

4 See generally EXECUTORS AND ADMINISTRATORS.

5 See CPR Sch 1 RSC Ord 15 r 14; para 205 post; and SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 913; CIVIL PROCEDURE. As to the CPR see PARA 133 note 1 ante.

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**204. Devolution on purchaser's death.**

On the death of the purchaser before completion<sup>1</sup>, his equitable interest in the property vests in his legal personal representatives<sup>2</sup>. If he has devised the property, the devisee will become entitled upon the personal representatives making an assent<sup>3</sup> in his favour, but he will take it subject to any lien which the vendor may have on it for the purchase price<sup>4</sup>. Except where the purchaser by his will or by deed or other documents has signified a contrary intention<sup>5</sup>, a specific devisee of the purchaser's interest in the land cannot claim to have the purchase money paid out of any other part of the estate of the deceased purchaser<sup>6</sup>. However, this liability of the land to bear the purchase money does not deprive the vendor of his right to enforce payment of the purchase money out of the purchaser's other assets or otherwise<sup>7</sup>. If the purchaser has died intestate, the equitable interest will be dealt with as part of his estate<sup>8</sup>.

1 As to the completion of the contract see PARAS 262-325 post.

2 See the Administration of Estates Act 1925 ss 1(1), 3(1)(i); and EXECUTORS AND ADMINISTRATORS.

3 See generally EXECUTORS AND ADMINISTRATORS.

4 See the Administration of Estates Act 1925 s 35(1); and EXECUTORS AND ADMINISTRATORS. See also *Re Birmingham, Savage v Stannard* [1959] Ch 523, [1958] 2 All ER 397.

5 As to what amounts to signifying a contrary intention see EXECUTORS AND ADMINISTRATORS.

6 *Re Cockcroft, Broadbent v Groves* (1883) 24 ChD 94. See also *Re Fraser, Lowther v Fraser* [1904] 1 Ch 111 (affd [1904] 1 Ch 726, CA), where the interest agreed to be purchased was a rentcharge issuing out of leasehold land, ie a chattel real passing to the next of kin.

7 See the Administration of Estates Act 1925 s 35(3); and EXECUTORS AND ADMINISTRATORS.

8 See *ibid* s 33(1) (as substituted); and EXECUTORS AND ADMINISTRATORS.

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### 205. Parties to action on purchaser's death.

On the death of the purchaser the contract continues to be binding as between the vendor and the purchaser's personal representatives, and an action by the vendor upon the contract, whether at law to recover damages for breach contract or in equity for specific performance, should be brought against the personal representatives; but if the purchaser has devised the property, the devisee may be made a party by special order<sup>1</sup>. An action against the vendor for damages for breach of the contract should be brought by the personal representatives, and until the purchaser's interest has vested in a devisee by assent or transfer from the personal representatives, the personal representatives are proper plaintiffs in an action for specific performance, and although the equitable interest of a devisee in whose favour an assent has

been made would support an action by him, yet in such an action the legal personal representatives should be parties, because they are liable for the purchaser money<sup>2</sup>.

1 See CPR Sch 1 RSC Ord 15 r 14; para 203 ante; and SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 913; CIVIL PROCEDURE. As to the nature of specific performance see PARAS 247-253 post; and SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARAS 801-804. As to the CPR see PARA 133 note 1 ante.

2 This is so even where the ultimate liability is on the land. As to the parties to the action see further SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 911 et seq. As to assents by personal representatives see EXECUTORS AND ADMINISTRATORS.

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## **B. BANKRUPTCY**

### **206. Bankruptcy of vendor.**

Where the vendor under an uncompleted contract becomes bankrupt, on the court's making a bankruptcy order<sup>1</sup>, the appointment of the trustee in bankruptcy automatically vests the vendor's legal estate in the property to be sold in the trustee in bankruptcy<sup>2</sup>, subject, nevertheless, to the equitable title of the purchaser to have the estate transferred to him on payment of the purchase price<sup>3</sup>. This is so if the purchase money is still unpaid, so that the vendor has a lien on the land for the amount<sup>4</sup>, or if he has otherwise any beneficial interest in the property or the possibility of a beneficial interest<sup>5</sup>.

Where, however, the title has been accepted and the whole purchase money paid to the vendor before the commencement of the bankruptcy<sup>6</sup>, so that the vendor is then a mere trustee for the purchaser with no beneficial interest in the property sold, the property is not divisible among the vendor's creditors and does not pass to the trustee in bankruptcy<sup>7</sup>.

1 As to the making of a bankruptcy order see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 203 et seq.

2 *Id* under the Insolvency Act 1986 s 306: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 391.

3 See *Re Pooley, ex p Rabbidge* (1878) 8 ChD 367 at 370, CA; *Re Scheibler, ex p Holthausen* (1874) 9 Ch App 722 at 726 per James LJ. As to the effect of bankruptcy upon a contract see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 418-419; as to its effect upon a power of sale exercisable with the consent of the bankrupt see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 404; and as to the transmission of registered land on bankruptcy and the protection of creditors see LAND REGISTRATION vol 26 (2004 Reissue) PARA 922.

4 See *St Thomas's Hospital Governors v Richardson* [1910] 1 KB 271, CA; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 598.

5 See *Carvalho v Burn* (1833) 4 B & Ad 382 at 393 per Littledale J. The legal estate of a tenant for life in settled land will not normally vest in his trustee in bankruptcy, notwithstanding that he has an equitable interest in it: see the Settled Land Act 1925 s 103 (as amended); and SETTLEMENTS vol 42 (Reissue) PARA 698. See also BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 404. As to the exercise of the statutory powers where the tenant for life unreasonably refuses to exercise them see s 24(1); *Re Cecil's Settled Estates* [1926] WN 262; and SETTLEMENTS vol 42 (Reissue) PARA 765 (contract not to exercise powers is void).

6 The day on which the bankruptcy order is made: see the Insolvency Act 1986 s 278(a); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 213, 217.

7 See *ibid* s 283(3)(a); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 428.

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### 207. Remedies against vendor's trustee in bankruptcy.

The remedy of the purchaser is either in damages at law for breach of the contract<sup>1</sup> or for specific performance in equity<sup>2</sup>. The former is a claim provable in the vendor's bankruptcy<sup>3</sup>, and after the making of the bankruptcy order the purchaser cannot commence an action for the breach without the leave of the court<sup>4</sup>. Without such leave he must prove in the bankruptcy, otherwise the vendor's liability is extinguished by the discharge of the bankrupt<sup>5</sup>, or by the acceptance by the creditors and approval by the court of a voluntary arrangement under the bankruptcy legislation<sup>6</sup>. The purchaser's claim for specific performance of the contract is not provable in the bankruptcy<sup>7</sup>, and may be enforced against the trustee in bankruptcy either by action or by claim in the bankruptcy<sup>8</sup>, and if not enforced during the bankruptcy is not extinguished by the discharge of the vendor or by a composition<sup>9</sup>.

1 As to damages for breach of contract see DAMAGES vol 12(1) (Reissue) PARAS 941-1087.

2 As to the remedy of specific performance generally see SPECIFIC PERFORMANCE.

3 See the Insolvency Act 1986 s 345(3); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 490 et seq.

4 See *ibid* s 285(3); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 218, 490. Moreover, at any time after the presentation of a bankruptcy petition the court may stay any proceedings against the property or person of the debtor: see s 285(1); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 218, 490, 730.

5 As to the effect of discharge see *ibid* s 281 (as amended); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 629 et seq.

6 As to voluntary arrangements see *ibid* Pt VIII (ss 252-263); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 81 et seq.

7 *Hardy v Fothergill* (1888) 13 App Cas 351 at 361, HL, per Lord Selborne; *Re Reis, ex p Clough* [1904] 2 KB 769 at 777, 781, 787, CA.

8 *Pearce v Bastable's Trustee in Bankruptcy* [1901] 2 Ch 122 (action); *Freevale Ltd v Metrostore (Holdings) Ltd* [1984] Ch 199, [1984] 1 All ER 495 (action against company in receivership); *Re Taylor, ex p Norvell* [1910] 1 KB 562, CA (claim in the bankruptcy); and see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 419. Similarly, the purchaser's lien for his deposit, if he relies on this only, is outside the bankruptcy: *Levy v Stogdon* [1898] 1 Ch 478 at 486; *affd* on another point [1899] 1 Ch 5, CA.

9 *Re Reis, ex p Clough* [1904] 2 KB 769, CA; *affd* [1905] AC 442, HL.

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Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (4) ASSIGNMENT AND DEVOLUTION OF RIGHTS/ (ii) Death or Change in Position of Parties/B. BANKRUPTCY/208. Disclaimer by vendor's trustee in bankruptcy.

### 208. Disclaimer by vendor's trustee in bankruptcy.

The vendor's trustee in bankruptcy may disclaim any onerous property on the ground that it is burdened with onerous covenants, and he may disclaim the contract for sale on the ground that it is unprofitable<sup>1</sup>, where, for instance, it binds the vendor to spend money on the property<sup>2</sup>. He must, therefore, either perform the contract and transfer the property, thereby entitling himself to receive the purchase money from the purchaser, or he must disclaim the contract and thereby cease to have any right to enforce it against the purchaser, in which case, although he is no longer bound to perform any onerous obligations, he has no right to receive the purchase money<sup>3</sup>, but this does not prejudice the purchaser's interest in the property. No disclaimer can take away the equitable interest which the purchaser has acquired in the property under his contract, or affect his right either to call upon the trustee to transfer the land to him<sup>4</sup>, or to apply for an order vesting the property in himself<sup>5</sup>.

1 See the Insolvency Act 1986 s 315(1); and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 472-473. As to the disclaimer of leasehold property see s 317; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 481. As to the disclaimer of property in a dwelling house see s 318; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 482. As to the disclaimer of land subject to a rentcharge see s 319; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 483. As to disclaimer generally see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 472 et seq.

2 *Re Bastable, ex p Trustee* [1901] 2 KB 518 at 529, CA.

3 *Re Bastable, ex p Trustee* [1901] 2 KB 518 at 529, CA.

4 *Re Bastable, ex p Trustee* [1901] 2 KB 518 at 529, CA.

5 *le* under the Insolvency Act 1986 ss 320, 321: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 485-486.

**UPDATE****137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (4) ASSIGNMENT AND DEVOLUTION OF RIGHTS/ (ii) Death or Change in Position of Parties/B. BANKRUPTCY/209. Registration of bankruptcy petitions and orders.

**209. Registration of bankruptcy petitions and orders.**

A bankruptcy petition may be registered in the register of pending actions<sup>1</sup>, and a bankruptcy order may be registered in the register of writs and orders affecting land<sup>2</sup>. The omission of the trustee in bankruptcy to register the petition as a pending action, and subsequently to register the bankruptcy order, renders the title of the trustee in bankruptcy void against a purchaser of the legal estate in good faith for money or money's worth<sup>3</sup>.

1 See the Land Charges Act 1972 s 5(1)(b); and LAND CHARGES vol 26 (2004 Reissue) PARA 647. The registration ceases after five years unless renewed: see s 8; and LAND CHARGES vol 26 (2004 Reissue) PARA 652.

2 See *ibid* s 6(1)(c) (as substituted); and LAND CHARGES vol 26 (2004 Reissue) PARA 654. The registration ceases after five years but may be renewed from time to time: see s 8; and LAND CHARGES vol 26 (2004 Reissue) PARA 660. As to delay in renewal see *Re A Receiving Order in Bankruptcy* [1947] Ch 498, [1947] 1 All ER 843.

3 See the Land Charges Act 1972 ss 5(8) (as amended), 6(5) (as substituted), 6(6) (as amended); and LAND CHARGES vol 26 (2004 Reissue) PARAS 650, 658. In order to obtain this protection against the trustee's title, the purchaser must have taken a conveyance of the legal estate; if he pays the purchase money without having a conveyance he may have to pay it over again to the trustee: *Re Pooley, ex p Rabbidge* (1878) 8 ChD 367, CA; *Powell v Marshall, Parkes & Co* [1899] 1 QB 710 at 713, CA. See also *Re Taylor, ex p Norvell* [1910] 1 KB 562, CA. As to the effect of completion before the date of the bankruptcy order see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 390 et seq, 417. As to the equivalent machinery in the case of registered land see LAND REGISTRATION vol 26 (2004 Reissue) PARA 922.

**UPDATE****137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (4) ASSIGNMENT AND DEVOLUTION OF RIGHTS/ (ii) Death or Change in Position of Parties/B. BANKRUPTCY/210. Bankruptcy of purchaser.

**210. Bankruptcy of purchaser.**



If the purchaser becomes bankrupt pending completion<sup>1</sup>, his trustee in bankruptcy may either elect within a reasonable time to pay the purchase price and complete the contract<sup>2</sup>, or may disclaim the contract as unprofitable<sup>3</sup>. The vendor cannot obtain specific performance against the purchaser's trustee in bankruptcy<sup>4</sup>. He may apply in writing to the trustee requiring him to decide whether he will disclaim or not<sup>5</sup>, or to the court for an order discharging obligations under the contract on such terms as to payment of damages (which would be provable as a debt in the bankruptcy) or otherwise as may seem equitable to the court<sup>6</sup>.

1 As to completion of the contract see PARAS 262-325 post.

2 *Re Nathan, ex p Stapleton* (1879) 10 ChD 586 at 590, CA. See also BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARAS 418-419. As to the trustee's right of action in respect of the contract see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 417 et seq.

3 See BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 472 et seq. If the trustee does not disclaim and does not elect to complete within a reasonable time, the vendor may prove in the bankruptcy for any loss: *Re Nathan, ex p Stapleton* (1879) 10 ChD 586, CA.

4 *Holloway v York* (1877) 25 WR 627; *Pearce v Bastable's Trustee in Bankruptcy* [1901] 2 Ch 122 at 125 per Cozens-Hardy J. Specific performance may perhaps be decreed where the trustee has adopted the contract: see note 5 infra. As to specific performance generally see SPECIFIC PERFORMANCE.

5 As to notice requiring the trustee's decision see the Insolvency Act 1986 s 316; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 480. As to the power to make such an application and the rule that a trustee who does not disclaim within the statutory period is deemed to have adopted the contract see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 480. It is not clear whether such adoption renders the trustee personally liable as a contracting party; probably he only adopts on behalf of the estate, and gives the vendor the right at his election to specific performance or damages: see Williams and Muir Hunter on Bankruptcy (19th Edn) 395.

6 See the Insolvency Act 1986 s 345; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 677.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (4) ASSIGNMENT AND DEVOLUTION OF RIGHTS/ (ii) Death or Change in Position of Parties/B. BANKRUPTCY/211. Purchaser an undischarged bankrupt.

### 211. Purchaser an undischarged bankrupt.

Where the purchaser is an undischarged bankrupt, the vendor cannot safely complete unless the purchaser can show to his satisfaction that the purchase money has been acquired by the purchaser after the commencement of the bankruptcy, and that his trustee in bankruptcy has not intervened to claim it<sup>1</sup>.

1 *Re Vanlohe, ex p Dewhurst* (1871) 7 Ch App 185; *Dyster v Randall & Sons* [1926] Ch 932, CA; and see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 417. As to the trustee in bankruptcy's power to claim after-acquired property see the Insolvency Act 1986 s 307; and BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 445; and as to a debtor against whom a bankruptcy order has been made obtaining a release of his liabilities under a voluntary arrangement or scheme approved by the court see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 107. If a bankrupt purchaser by the terms of the contract becomes entitled to receive from the vendor credit to the extent of a prescribed amount or upwards, without disclosing the fact that he is an undischarged bankrupt, as required by s 360 (see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (Reissue) PARA 721), the contract is unenforceable by the purchaser, and the vendor, on discovering the facts, may obtain an order for rescission of the contract: see *De Choisy v Hynes* [1937] 4 All ER 54, 81 Sol Jo 883.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (4) ASSIGNMENT AND DEVOLUTION OF RIGHTS/ (ii) Death or Change in Position of Parties/C. WINDING UP/212. Effect of winding-up petition.

## C. WINDING UP

### 212. Effect of winding-up petition.

In the case of a winding up by the court, every disposition of the company's property made after the commencement of the winding up is void unless the court otherwise orders<sup>1</sup>. Hence a contract for the purchase of land from a company cannot safely be completed after the presentation of the petition, since it involves the disposition of the company's land. Similarly, a contract for the sale of land to a company should not be completed, since it involves the disposition of the company's money<sup>2</sup>.

1 See the Insolvency Act 1986 s 127; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 700. As to the commencement of the winding up see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 489.

2 If the contract is for sale by the company, and is specifically enforceable, the equitable interest is already in the purchaser, and the company on completion only disposes of the legal interest, and the court, if the transaction is in good faith, will probably validate the disposition. If the contract is for purchase by the company, the payment of the purchase money by the company involves more risk: see *Re Civil Service and General Store Ltd* (1887) 57 LJ Ch 119. In either case completion should be postponed until the winding-up petition has been dealt with. The court will validate transactions entered into in the ordinary course of business and completed before the winding-up order (*Re Wiltshire Iron Co, ex p Pearson* (1868) 3 Ch App 443 at 447: see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 700), but this rule would only in exceptional cases apply to a sale or purchase of land.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (4) ASSIGNMENT AND DEVOLUTION OF RIGHTS/ (ii) Death or Change in Position of Parties/C. WINDING UP/213. Completion by liquidator.

### 213. Completion by liquidator.

After the winding-up order has been made<sup>1</sup>, or on the appointment of the liquidator in a voluntary winding up<sup>2</sup>, the powers of the directors normally cease<sup>3</sup>, and the completion of a pending contract rests with the liquidator, subject to the control of the court<sup>4</sup>. The liquidator in the exercise of his power to realise the company's assets<sup>5</sup> can adopt and carry into effect a contract of sale. Apart from this, it is the duty of the liquidator, if the contract is specifically enforceable, to complete the purchaser's title by affixing the company's common seal to a transfer of the legal estate and to receive the purchase money<sup>6</sup>. In the case of a contract for purchase, he can, with the vendor's concurrence, resell the land and pay the vendor pro tanto out of the proceeds, leaving the vendor to prove in the winding up for any deficiency in the price<sup>7</sup>.

<sup>1</sup> As to winding up by the court generally see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 438 et seq.

<sup>2</sup> As to voluntary winding up generally see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 939 et seq.

<sup>3</sup> See the Insolvency Act 1986 s 91(2); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 997.

<sup>4</sup> See *ibid* s 167(1)(b), (3), Sch 4 para 6; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARAS 578, 580. The liquidator is an officer of the court: see the Insolvency Rules 1986, SI 1986/1925, r 4.179(1); and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 574). As to the liquidator's duties in a voluntary winding up see *Re TH Knitwear (Wholesale) Ltd* [1988] Ch 275, [1988] 1 All ER 860, CA; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 571.

<sup>5</sup> See the Insolvency Act 1986 Sch 4 Pt III; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 577.

<sup>6</sup> Under such circumstances the land is not the property of the company; the company's interest is transferred by the contract to the purchase money: see PARA 177 ante. As to transfer by a company in liquidation see PARA 277 post. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

<sup>7</sup> See *Thames Plate Glass Co v Land and Sea Telegraph Co* (1870) LR 11 Eq 248 at 250.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (4) ASSIGNMENT AND DEVOLUTION OF RIGHTS/ (ii) Death or Change in Position of Parties/C. WINDING UP/214. Liquidator's refusal to complete.

## 214. Liquidator's refusal to complete.

If the liquidator under a compulsory or voluntary winding up declines to complete the contract, the other party may either prove in the winding up for any loss which he has sustained<sup>1</sup> or bring an action for specific performance<sup>2</sup>. Where judgment is given for specific performance and the company is the vendor, completion will follow by transfer by the company and payment of the purchase money to the liquidator<sup>3</sup>. If the company is the purchaser, the vendor's claim, as the result of specific performance, is a money claim in the winding up for the deficiency in the purchase money left after resale of the land and payment of the proceeds to the vendor<sup>4</sup>.

<sup>1</sup> Alternatively, if the claim or the amount of damages is likely to be disputed, he can bring an action for breach of contract (see *Currie v Consolidated Kent Collieries Corp Ltd* [1906] 1 KB 134, CA; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 893), and then prove for the damages. As to the measure of damages see PARAS 254-258 post.

<sup>2</sup> See *Thames Plate Glass Co v Land and Sea Telegraph Co* (1870) LR 11 Eq 248 at 250. As to obtaining leave to bring the action see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 893 et seq. There may be an order to stay the proceedings, save so far as necessary to determine the point in dispute: see *Thames Plate Glass Co v Land and Sea Telegraph Co* supra. As to specific performance see PARAS 247-253 post; and SPECIFIC PERFORMANCE.

<sup>3</sup> See PARA 213 ante. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

<sup>4</sup> See *Thames Plate Glass Co v Land and Sea Telegraph Co* (1870) LR 11 Eq 248.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (4) ASSIGNMENT AND DEVOLUTION OF RIGHTS/ (ii) Death or Change in Position of Parties/C. WINDING UP/215. Action by the liquidator.

## 215. Action by the liquidator.

Where the other party to the contract refuses to complete, the liquidator may bring an action in the name of the company either for damages or for specific performance<sup>1</sup>.

<sup>1</sup> See COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 577. As to the completion of the contract see PARAS 262-325 post. As to specific performance see PARAS 247-253 post; and SPECIFIC PERFORMANCE. As to damages see PARAS 254-261 post; and DAMAGES.

**UPDATE****137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (4) ASSIGNMENT AND DEVOLUTION OF RIGHTS/ (ii) Death or Change in Position of Parties/D. EXECUTION/216. Effect of charging order.

**D. EXECUTION****216. Effect of charging order.**

A charging order made in favour of a judgment creditor upon land or an interest in land belonging to the debtor is registrable in the same way as other orders or writs for enforcing judgments<sup>1</sup>, and has otherwise the same effect as an equitable charge created by the debtor<sup>2</sup>. It seems that the charge created by such an order takes effect subject to the equitable interest of a purchaser in the land under a prior contract for sale<sup>3</sup>. Unless protected by registration, such a charge, in the case of unregistered land, is void against a subsequent purchaser for valuable consideration<sup>4</sup> and, in the case of registered land, a person taking under a registered disposition is not concerned with the charge<sup>5</sup>. Where such a charge has been registered, a person who subsequently enters into a contract to purchase the land cannot safely pay his purchase money to the vendor without either satisfying the judgment creditor out of the purchase money or obtaining his consent to payment to the vendor<sup>6</sup>.

1 See the Charging Orders Act 1979 s 3(2); and LAND CHARGES vol 26 (2004 Reissue) PARA 655; CIVIL PROCEDURE vol 12 (2009) PARA 1481. Registration against a company under what is now the Companies Act 1985 s 395 (as amended) (see COMPANIES vol 15 (2009) PARA 1279) is not necessary: *Re Overseas Aviation Engineering (GB) Ltd* [1963] Ch 24, [1962] 3 All ER 12, CA. See also LAND CHARGES vol 26 (2004 Reissue) PARAS 654-655; LAND REGISTRATION. As to charging orders generally see the Charging Orders Act 1979 ss 1 (as amended), 2; and CIVIL PROCEDURE vol 12 (2009) PARA 1467 et seq.

2 Ibid s 3(4). As to the property which may be charged see s 2; and CIVIL PROCEDURE vol 12 (2009) PARA 1468.

3 Cf *Prior v Penpraze* (1817) 4 Price 99; *Lodge v Lyseley* (1832) 4 Sim 70; and MORTGAGE vol 77 (2010) PARA 101 et seq.

4 See LAND CHARGES vol 26 (2004 Reissue) PARA 658.

5 See LAND REGISTRATION. As to the effect where a charging order is protected by a caution see *Clark v Chief Land Registrar* [1994] Ch 370, [1994] 4 All ER 96, CA.

6 See the note to *Forth v Duke of Norfolk* (1820) 4 Madd 503 at 506; and PARA 314 post.

**UPDATE****137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (4) ASSIGNMENT AND DEVOLUTION OF RIGHTS/ (ii) Death or Change in Position of Parties/D. EXECUTION/217. Appointment of receiver.

### **217. Appointment of receiver.**

The appointment of a receiver of the vendor's interest in unpaid purchase money, or of the purchaser's interest in the land, is ineffectual if for any reason the contract is not completed so that the money or land, as the case may be, does not come into the debtor's hands<sup>1</sup>.

<sup>1</sup> *Ridout v Fowler* [1904] 2 Ch 93, CA. As to the effect of the appointment of a receiver generally see generally CIVIL PROCEDURE vol 12 (2009) PARA 1497; RECEIVERS. Where a charging order has been registered as a land charge, an order subsequently appointing a receiver is not void against a purchaser even though not itself registered: see the Supreme Court Act 1981 s 37(5); County Courts Act 1984 s 107(3); Land Charges Act 1972 ss 6(4) (as amended), 18(6); and LAND CHARGES vol 26 (2004 Reissue) PARA 658.

## **UPDATE**

### **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### **217 Appointment of receiver**

NOTE 1--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (4) ASSIGNMENT AND DEVOLUTION OF RIGHTS/ (ii) Death or Change in Position of Parties/E. MENTAL DISORDER/218. Contract not avoided by subsequent mental disorder.

## **E. MENTAL DISORDER**

### **218. Contract not avoided by subsequent mental disorder.**

A contract for the sale of land made between parties capable of contracting at the time is not avoided by the fact that either party becomes mentally disordered before completion<sup>1</sup>.

<sup>1</sup> See eg *Hall v Warren* (1804) 9 Ves 605; and MENTAL HEALTH vol 30(2) (Reissue) PARA 601. As to sales and purchases on behalf of mentally disordered persons generally see MENTAL HEALTH vol 30(2) (Reissue) PARA 671 et seq.

## **UPDATE**

### **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (4) ASSIGNMENT AND DEVOLUTION OF RIGHTS/ (ii) Death or Change in Position of Parties/E. MENTAL DISORDER/219. Vesting order.

#### **219. Vesting order.**

Where a vendor becomes mentally disordered after the purchase money has been paid, or the contract has been so far performed that a decree for specific performance would be a matter of course, and the purchase money or the balance due is ready to be paid, the purchaser can obtain a High Court order vesting the property in him<sup>1</sup>.

<sup>1</sup> See under the Trustee Act 1925 s 44(ii): see PARA 266 post; and TRUSTS vol 48 (2007 Reissue) PARA 875. As to the vendor becoming a constructive trustee for the purchaser see PARA 177 ante. The High Court and the judge or master concerned with the management of the property of mental patients have concurrent jurisdiction to make a vesting order in this case: see s 54(2)(c) (substituted by the Mental Health Act 1959 s 149(1), Sch 7 Pt 1); and TRUSTS vol 48 (2007 Reissue) PARA 851. See also *Re Cuming* (1869) 5 Ch App 72; *Re Pagani*, *Re Pagani's Trust* [1892] 1 Ch 236, CA; and MENTAL HEALTH vol 30(2) (Reissue) PARA 721.

## **UPDATE**

### **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(5) APPLICATIONS BY VENDOR OR PURCHASER FOR SUMMARY ORDER/(i) Jurisdiction/220. Application for summary order.

## **(5) APPLICATIONS BY VENDOR OR PURCHASER FOR SUMMARY ORDER**

### **(i) Jurisdiction**

#### **220. Application for summary order.**

A vendor or purchaser<sup>1</sup> of any interest in land<sup>2</sup>, or their representatives respectively, may apply<sup>3</sup> in a summary way to the court<sup>4</sup> in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract (not being a question affecting the existence or validity of the contract), and the court may make such order upon the application as may appear just, and may order how and by whom all or any of the costs of and incident to the application are to be borne and paid<sup>5</sup>.

In cases where this procedure is available it must be adopted in preference to bringing an action<sup>6</sup>.

1 For the meaning of 'purchaser' see PARA 55 note 16 ante.

2 For the meaning of 'land' see PARA 139 note 1 ante.

3 As to the procedure for making an application see PARA 227 post.

4 For these purposes, unless the contrary intention appears, 'the court' means the High Court or the county court, where those courts respectively have jurisdiction: Law of Property Act 1925 s 203(3) (amended by the Courts Act 1971 s 56(4), Sch 11 Pt II). Proceedings in the High Court are assigned to the Chancery Division: see the Law of Property Act 1925 s 203(4); and the Supreme Court Act 1981 s 61(1), Sch 1 para 1(a). The county court has jurisdiction where the land does not exceed £30,000 in capital value: Law of Property Act 1925 s 49(4) (added by the County Courts Act 1984 s 148(1), Sch 2 Pt II para 2(1), (3); and amended by the High Court and County Courts Jurisdiction Order 1991, SI 1991/754, art 2(8), Schedule). In any event the parties may agree that a county court is to have jurisdiction: see the County Courts Act 1984 s 24 (as amended); and COURTS.

5 Law of Property Act 1925 s 49(1). Section 49 (as amended) applies to a contract for the sale or exchange of any interest in land: s 49(3). The jurisdiction has been exercised in respect of contracts to create, as well as contracts to assign, leasehold interests (see *Re Anderton and Milner's Contract* (1890) 45 ChD 476; *Re Lander and Bagley's Contract* [1892] 3 Ch 41; and *Re Stephenson and Cox* (1892) 36 Sol Jo 287, CA), and has even been applied to a voluntary grant on counsel for each side admitting a contract for a nominal consideration (*Re Marquis of Salisbury* (1875) as reported in 23 WR 824; revsd on another point (1876) 2 ChD 29, CA). As to the application of the procedure to the acquisition of the freehold or an extended lease under the Leasehold Reform Act 1967 see s 22; and LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1440. As to summary judgment under the Civil Procedure Rules 1998, which came into force on 26 April 1999, see CPR Pt 24. As to the CPR see PARA 133 note 1 ante.

6 See *King v Chamberlayn* [1887] WN 158 at 159, where North J said that if the plaintiff had deliberately adopted the more expensive mode of proceeding by action, he would not have allowed any more costs than the costs of what is now an application under the Law of Property Act 1925 s 49 (as amended). A judge sitting in bankruptcy may for convenience and with the consent of the parties decide a point which would ordinarily be decided on what is now an application under s 49 (as amended): *Re Martin, ex p Dixon (Trustee) v Tucker* (1912) 106 LT 381.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### 220 Application for summary order

NOTE 4--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).



Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(5) APPLICATIONS BY VENDOR OR PURCHASER FOR SUMMARY ORDER/(i) Jurisdiction/221. Scope of jurisdiction.

## **221. Scope of jurisdiction.**

An application by vendor or purchaser for a summary order<sup>1</sup> puts the parties in the same position in chambers in which they would have been, and with all the rights which they would have had, under a judgment for specific performance<sup>2</sup>. Hence, whatever could be done in chambers upon a reference as to title under such a judgment, where the contract has been established, can be done on such an application<sup>3</sup>. The procedure is not, however, intended to enable the court to try summarily disputed questions of fact<sup>4</sup>, and an application under these provisions<sup>5</sup> cannot be treated as if it were an action for specific performance, or for rescission, or for any other purpose<sup>6</sup>. It enables either party to the contract to obtain a decision upon some isolated point, or points, without having recourse to an action for specific performance<sup>7</sup>, such as whether a requisition has been sufficiently answered, or whether a requisition is precluded by the conditions<sup>8</sup>, or any short point of law or construction arising on the abstract, contract or requisitions<sup>9</sup>.

1    le under the Law of Property Act 1925 s 49 (as amended): see PARA 220 ante.

2    As to specific performance see PARAS 247-253 post; and SPECIFIC PERFORMANCE.

3    See *Re Burroughs, Lynn and Sexton* (1877) 5 ChD 601 at 604, CA, per James LJ. The particular point in that case was that affidavit evidence could be admitted and the deponents cross-examined. As to references to title see SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 934 et seq.

4    See *Re Burroughs, Lynn and Sexton* (1877) 5 ChD 601 at 603, CA; *Re Popple and Barratt's Contract* (1877) 25 WR 248, CA; *Re Gray and Metropolitan Rly Co* (1881) 44 LT 567. Questions of fraud cannot be entertained on an application under the Law of Property Act 1925 s 49 (as amended): see PARA 224 post.

5    See note 1 supra.

6    See *Re Hargreaves and Thompson's Contract* (1886) 32 ChD 454 at 456, CA, per Cotton LJ. See also *Re South Eastern Rly Co and London County Council's Contract, South Eastern Rly Co v LCC* [1915] 2 Ch 252, CA.

7    See *Re Hargreaves and Thompson's Contract* (1886) 32 ChD 454 at 459, CA, per Lindley LJ; *Re Wallis and Barnard's Contract* [1899] 2 Ch 515 at 519.

8    See *Re Burroughs, Lynn and Sexton* (1877) 5 ChD 601 at 603, CA.

9    See *Re Popple and Barratt's Contract* (1877) 25 WR 248 at 249, CA, per James LJ. Cf *Re Wallis and Barnard's Contract* [1899] 2 Ch 515 at 520-521, where Kekewich J deprecated the making on such applications of declarations that the vendor has or has not shown a good title or a title which cannot be forced on the purchaser, ie embracing the whole title instead of dealing with isolated questions. As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 ante. As to the vendor's obligation to show and prove a good title see PARA 137 ante. As to the formation of the contract see PARAS 23-40 ante; as to requisitions on title see PARAS 163-166 ante; and as to the questions which can be decided on an application under the Law of Property Act 1925 s 49 (as amended) see PARAS 220 note 5 ante, 225-226 post.

## **UPDATE**

### **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(5) APPLICATIONS BY VENDOR OR PURCHASER FOR SUMMARY ORDER/(i) Jurisdiction/222. Consequential relief.

## **222. Consequential relief.**

The jurisdiction to make such order as appears just<sup>1</sup> enables the judge to give relief which is the ordinary consequence of the decision of the point submitted to him<sup>2</sup>. Thus when the decision of the point raised necessarily involves a determination that the vendor has not made a good title, an order may be made for the return of the deposit with interest, and payment by the vendor of the purchaser's costs of investigating title, whether the application was taken out by the vendor or the purchaser<sup>3</sup>. An order for payment of unliquidated damages as compensation for a vendor's delay, or of any sum which entails an inquiry and is not merely a matter for computation or taxation, cannot, however, be made on an application under these provisions<sup>4</sup>, as such an application cannot be treated as an action for damages<sup>5</sup>.

1 See the Law of Property Act 1925 s 49 (as amended); and PARA 220 ante.

2 See *Re Hargreaves and Thompson's Contract* (1886) 32 ChD 454, CA.

3 See *Re Hargreaves and Thompson's Contract* (1886) 32 ChD 454, CA. See also *Re Metropolitan District Rly Co and Cosh* (1880) 13 ChD 607, CA; *Re Higgins and Hitchman's Contract* (1882) 21 ChD 95; *Re Smith and Stott* (1883) 48 LT 512; *Re Yeilding and Westbrook* (1886) 31 ChD 344; *Re Ebsworth and Tidy's Contract* (1889) 42 ChD 23 at 53, CA; *Re Bryant and Barningham's Contract* (1890) 44 ChD 218 at 222, CA; *Re Marshall and Salt's Contract* [1900] 2 Ch 202 at 206; *Re Hare and O'More's Contract* [1901] 1 Ch 93 at 96; *Re Haedicke and Lipski's Contract* [1901] 2 Ch 666 at 670. Cf *Furneaux and Aird's Contract* [1906] WN 215. Such orders were made on a vendor's application in *Re Higgins and Percival* (1888) 59 LT 213; and *Re Walker and Oakshott's Contract* [1901] 2 Ch 383 at 387.

As to the vendor's obligation to show and prove a good title see PARA 137 ante; as to the purchaser's right to recover the deposit with interest see PARAS 245-246 post; as to the purchaser's expenses recoverable by way of damages see PARA 257 post; as to the usual costs paid by the purchaser see PARA 323 post; and as to when an application under the Law of Property Act 1925 s 49 (as amended) is or is not the proper proceeding see PARAS 225-226 post.

4 Ie an application under the Law of Property Act 1925 s 49 (as amended); see PARA 220 ante. See also *Re Wilsons and Stevens' Contract* [1894] 3 Ch 546 at 552.

5 See *Re Hargreaves and Thompson's Contract* (1886) 32 ChD 454, CA. As to damages see PARAS 254-261 post; and DAMAGES.

## **UPDATE**

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### 223. Doubtful title.

The court may decide that the title is too doubtful to be forced on a purchaser<sup>1</sup>. In particular, although the court may be prepared on an application<sup>2</sup> to decide a point of construction of a will or document<sup>3</sup>, yet where there is real difficulty or doubt in construing a will, the court will not force the title on the purchaser, for that might result in his buying a lawsuit<sup>4</sup>. So, too, it seems that the court would not decide a question of latent ambiguity in the description of a beneficiary under a will, for on such a question evidence from beneficiaries may be needed and all beneficiaries should be before the court<sup>5</sup>.

1 *Re Thackwray and Young's Contract* (1888) 40 ChD 34; *Re New Land Development Association and Gray* [1892] 2 Ch 138, CA; *Re Hollis' Hospital Trustees and Hague's Contract* [1899] 2 Ch 540 at 555; *Re Marshall and Salt's Contract* [1900] 2 Ch 202; *Re Handman and Wilcox's Contract* [1902] 1 Ch 599, CA. Cf *Re Wallis and Barnard's Contract* [1899] 2 Ch 515 at 521 (cited in PARA 221 note 9 ante).

2 *le* an application under the Law of Property Act 1925 s 49 (as amended): see PARA 220 ante.

3 See *Re Hill to Chapman* (1885) 54 LJ Ch 595, CA; *Re Bishop and Richardson's Contract* [1899] 1 IR 71; *Re Guyton and Rosenberg's Contract* [1901] 2 Ch 591; *Re Murphy and Griffin's Contract* [1919] 1 IR 187.

4 See *Re Nichols' and Von Joel's Contract* [1910] 1 Ch 43 at 46-47, CA, where the vendor should have taken out an originating summons for construction, the decision upon which would have bound all parties concerned. Cf *Smith v Colbourne* [1914] 2 Ch 533 at 544, CA; *Johnson v Clarke* [1928] Ch 847 at 854. A vendor in such a case who nevertheless proceeds by an application under the Law of Property Act 1925 s 49 (as amended) may even though successful be ordered to pay costs: *Re Nichols' and Von Joel's Contract* supra; *Re Hogan and Marnell's Contract* [1919] 1 IR 422; *Wilson v Thomas* [1958] 1 All ER 871, [1958] 1 WLR 422. An application under the Law of Property Act 1925 s 49 (as amended) can be amended so as to make it also an application for construction: see *Re Tippet's and Newbould's Contract* (1888) 37 ChD 444, CA. As to the court's duty to construe wills see WILLS vol 50 (2005 Reissue) PARA 479.

5 See *Wilson v Thomas* [1958] 1 All ER 871 at 878, 880, [1958] 1 WLR 422 at 431, 433 per Roxburgh J. This was an action, not an application under the Law of Property Act 1925 s 49 (as amended), but the court followed *Re Nichols' and Von Joel's Contract* [1910] 1 Ch 43, CA, which was decided on such an application, stating that the case before it was stronger. As to the misdescription of donees under a will see WILLS vol 50 (2005 Reissue) PARA 619 et seq.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

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### 224. Question of validity of contract excluded.

Owing to the express exclusion of the power to decide on an application under these provisions<sup>1</sup> questions affecting the existence or validity of the contract<sup>2</sup>, the question whether the contract is fraudulent cannot be so decided<sup>3</sup>. However, the exception relates to the existence or validity of the contract in its inception, and does not preclude the court from

deciding the validity of a vendor's notice to rescind the contract<sup>4</sup>. The fact that the existence or validity of the contract, or the right of one party or the other to rescind it, is or may be the subject of dispute between the parties does not preclude the court from deciding a point properly raised by the application<sup>5</sup>.

1    le the Law of Property Act 1925 s 49 (as amended): see PARA 220 ante.

2    See *ibid* s 49(1); and PARA 220 ante.

3    See *Re Hargreaves and Thompson's Contract* (1886) 32 ChD 454 at 459, CA; *Re Davis and Cavey* (1888) 40 ChD 601 at 608; *Re Sandbach and Edmondson's Contract* [1891] 1 Ch 99 at 102, CA; *Re Delany and Deegan's Contract* [1905] 1 IR 602. As to contracts induced by misrepresentation see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 704, 783 et seq, 812 et seq; CONTRACT vol 9(1) (Reissue) PARAS 767-768, 987.

4    See *Re Jackson and Woodburn's Contract* (1887) 37 ChD 44, following *Re Dames and Wood* (1885) 29 ChD 626, CA. As to the formation of the contract see PARAS 23-40 ante; and as to rescission of the contract by the vendor see PARAS 232-233 post.

## UPDATE

## UPDATE

### 137-261 Rights and Duties Prior to Completion

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Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(5) APPLICATIONS BY VENDOR OR PURCHASER FOR SUMMARY ORDER/(ii) Questions Determinable/225. Questions as to the meaning and effect of the contract.

## (ii) Questions Determinable

### 225. Questions as to the meaning and effect of the contract.

The questions which may properly be raised and decided on an application under these provisions<sup>1</sup> include the following questions with regard to the meaning and effect of the contract for sale:

- 1    (1) whether a perpetual rent agreed to be sold was properly described in the contract as a rentcharge<sup>2</sup>;
- 2    (2) whether under the terms of the contract the purchaser was entitled to a right of way to the land sold<sup>3</sup>;
- 3    (3) the effect of a plan upon the construction of expressions in particulars of sale<sup>4</sup>;
- 4    (4) the effect of conditions of sale limiting a purchaser's right to investigate or raise objections to the vendor's title<sup>5</sup>, or precluding<sup>6</sup> or providing<sup>7</sup> for compensation for errors of description;
- 5    (5) whether a condition is misleading<sup>8</sup>;

- 6 (6) whether in particular circumstances a vendor has, under the conditions, a right to rescind<sup>9</sup>, and, if so, upon what terms<sup>10</sup>;
- 7 (7) whether a purchaser is entitled to repudiate the contract<sup>11</sup>;
- 8 (8) whether, and as from what date, a purchaser is liable to pay interest on his purchase money<sup>12</sup>;
- 9 (9) whether, on a sale of premises with possession, the property sold includes a claim for dilapidations against an outgoing tenant<sup>13</sup>; and
- 10 (10) whether there is any statutory claim for compensation<sup>14</sup>.

1 le the Law of Property Act 1925 s 49 (as amended): see PARA 220 ante.

2 See *Re Lord Gerard and Beecham's Contract* [1894] 3 Ch 295, CA. As to perpetual rent see RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 780.

3 See *Re Lavery and Kirk* (1888) 33 Sol Jo 127; *Re Hughes and Ashley's Contract* [1900] 2 Ch 595 at 600, CA; *Re Walmsley and Shaw's Contract* [1917] 1 Ch 93. As to rights of way see EASEMENTS AND PROFITS A PRENDRE.

4 See *Re Lindsay and Forder's Contract* (1895) 72 LT 832; *Re Wellings and Parsons' Contract* (1906) 97 LT 165; *Re Freeman and Taylor's Contract* (1907) 97 LT 39.

5 See *Re Cox and Neve's Contract* [1891] 2 Ch 109 at 118; *Re National Provincial Bank of England and Marsh* [1895] 1 Ch 190; *Re Scott and Alvarez's Contract*, *Scott v Alvarez* [1895] 1 Ch 596, CA (subsequent proceedings [1895] 2 Ch 603, CA); *Re Englefield Holdings Ltd and Sinclair's Contract* [1962] 3 All ER 503, [1962] 1 WLR 1119.

6 See *Re Beyfus and Masters's Contract* (1888) 39 ChD 110, CA.

7 See *Re Leyland and Taylor's Contract* [1900] 2 Ch 625, CA.

8 See *Re Marsh and Earl Granville* (1883) 24 ChD 11, CA; *Re Sandbach and Edmondson's Contract* [1891] 1 Ch 99, CA; *Re Turpin and Ahern's Contract* [1905] 1 IR 85; *Faruqi v English Real Estates Ltd* [1979] 1 WLR 963, 38 P & CR 318.

9 See *Re Jackson and Oakshott* (1880) 14 ChD 851; *Re Great Northern Rly Co and Sanderson* (1884) 25 ChD 788; *Re Monckton and Gilzean* (1884) 27 ChD 555; *Re Dames and Wood* (1885) 29 ChD 626, CA; *Re Jackson and Woodburn's Contract* (1887) 37 ChD 44; *Re Arbib and Class's Contract* [1891] 1 Ch 601, CA; *Re Deighton and Harris's Contract* [1898] 1 Ch 458, CA; *Re Jackson and Haden's Contract* [1906] 1 Ch 412, CA; *Re Weston and Thomas's Contract* [1907] 1 Ch 244. As to the vendor's right to rescind the contract see PARAS 232-233 post.

10 See *Re Spindler and Mear's Contract* [1901] 1 Ch 908.

11 See *Re White and Smith's Contract* [1896] 1 Ch 637; *Re Haedicke and Lipski's Contract* [1901] 2 Ch 666; *Re Stone and Saville's Contract* [1963] 1 All ER 353, [1963] 1 WLR 163, CA. As to repudiation by the purchaser see PARAS 239-244 post.

12 See *Re Pigott and Great Western Rly Co* (1881) 18 ChD 146; *Re Riley to Streatfield* (1886) 34 ChD 386; *Re Hetling and Merton's Contract* [1893] 3 Ch 269, CA; *Re London Corp'n and Tubbs' Contract* [1894] 2 Ch 524, CA; *Re Wilsons and Stevens' Contract* [1894] 3 Ch 546; *Re Earl of Strafford and Maples* [1896] 1 Ch 235, CA; *Re Woods and Lewis' Contract* [1898] 2 Ch 211, CA. See also *Re Young and Harston's Contract* (1885) 31 ChD 168, CA, where the court ordered a vendor to repay an excess of interest paid under protest and without prejudice. As to the vendor's right to interest on purchase money see PARAS 194-197 ante.

13 See *Re Edie and Brown's Contract* (1888) 58 LT 307. See also *Re Earl of Derby and Fergusson's Contract* [1912] 1 Ch 479 (sale of agricultural land where tenant entitled to compensation for improvements); *Re Lyne-Stephens and Scott-Miller's Contract* [1920] 1 Ch 472, CA (purchaser's claim to dilapidations). As to the vendor's entitlement to any sum paid in respect of dilapidations at the end of the tenancy see PARA 192 ante.

14 See *Re Armitage's Contract*, *Armitage v Inkpen* [1949] Ch 666 (compensation in respect of war damage) (see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 533 et seq); *Re Hamilton-Snowball's Conveyance* [1959] Ch 308, [1958] 2 All ER 319 (compensation in respect of requisition) (see WAR AND ARMED CONFLICT vol 49(1) (2005 Reissue) PARA 508 et seq).

## UPDATE

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#### 226. Other questions determinable.

Other questions which may be determined on an application under these provisions<sup>1</sup> are:

- 11 (1) questions as to the abstract, such as whether the abstract is complete notwithstanding that a particular document is not abstracted in chief<sup>2</sup>;
- 12 (2) questions whether the vendor has discharged his obligation to show and prove a good title in accordance with the contract<sup>3</sup>; as to the title of persons filling a particular capacity<sup>4</sup>; and whether the vendor is bound to answer or comply with a particular requisition<sup>5</sup>;
- 13 (3) questions as to the interpretation and effect of Acts of Parliament, if they arise out of, or are connected with, the contract<sup>6</sup>;
- 14 (4) questions as to the incidence of and liability for expenses, such as stamps<sup>7</sup>, the cost of searching for and obtaining title deeds not in the vendor's possession<sup>8</sup>, of the perusal and execution of the transfer by concurring parties<sup>9</sup>, or of obtaining a surveyor's certificate to prove performance of a building covenant in a lease<sup>10</sup>;
- 15 (5) questions as to the payment of compensation<sup>11</sup>;
- 16 (6) questions as to the form of the assurance to the purchaser, including questions as to the proper parties to concur in the transfer<sup>12</sup>, as to the form of the transfer<sup>13</sup>, and as to the insertion in it of restrictions or of covenants on the part of the purchaser<sup>14</sup> or the vendor<sup>15</sup>; and
- 17 (7) questions as to the right to the title deeds of the property sold<sup>16</sup>.

1 The Law of Property Act 1925 s 49 (as amended): see PARA 220 ante.

2 See *Re Stamford, Spalding and Boston Banking Co and Knight's Contract* [1900] 1 Ch 287; cf *Re Ebsworth and Tidy's Contract* (1889) 42 ChD 23 at 31, 34, CA, per North J. As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 ante.

3 Such questions, being the subject of requisitions or objections, are necessarily within the scope of an application under the Law of Property Act 1925 s 49 (as amended) (see PARA 220 ante): see *Re Coward and Adam's Purchase* (1875) LR 20 Eq 179 (receipt by married woman for legacy); *Re Packman and Moss* (1875) 1 ChD 214; *Re Brown and Sibly's Contract* (1876) 3 ChD 156; *Re Coleman and Jarrom* (1876) 4 ChD 165; *Re Frith and Osbourne* (1876) 3 ChD 618 (power to partition); *Re Foster and Lister* (1877) 6 ChD 87 (validity of post-nuptial settlement); *Re White and Hindle* (1877) 7 ChD 201; *Re Hutchinson and Tenant* (1878) 8 ChD 540; *Sturge and Great Western Rly Co* (1881) 19 ChD 444 (construction of a will); *Re Bellamy and Metropolitan Board of Works* (1883) 24 ChD 387, CA; *Hallett to Martin* (1883) 24 ChD 624 (power to grant lease); *Re Walker and Hughes' Contract* (1883) 24 ChD 698; *Re Harman and Uxbridge and Rickmansworth Rly Co* (1883) 24 ChD 720; *Re Glenny and Hartley* (1884) 25 ChD 611; *Re Great Northern Rly Co and Sanderson* (1884) 25 ChD 788 (removal of incumbrances); *Re Tweedie and Miles* (1884) 27 ChD 315 (continuance of trust for sale); *Re Flower and Metropolitan Board of Works* (1884) 27 ChD 592 (payment of purchase money to trustee-vendors personally); *Re Horne and Hellard* (1885) 29 ChD 736 (proof that charge in debentures has not crystallised); *Nichols to Nixey* (1885) 29 ChD 1005 (as to power of appointment not vesting in trustee in bankruptcy); *Re Naylor and Spendla's Contract* (1886) 34 ChD 217, CA (as to fine and fees payable to lord and steward in

respect of copyholds); *Re Coates to Parsons* (1886) 34 ChD 370 (as to validity of appointment of trustees); *Re Lidiard and Jackson's and Broadley's Contract* (1889) 42 ChD 254 (presumption as to enfranchisement of copyholds); *Re New Land Development Association and Gray* [1892] 2 Ch 138, CA (bankrupt's power to dispose of after-acquired property); *Re Lord Sudeley and Baines & Co* [1894] 1 Ch 334; *Re Clayton and Barclay's Contract* [1895] 2 Ch 212 (bankrupt's power to dispose of after-acquired property); *Re Lord and Fullerton's Contract* [1896] 1 Ch 228, CA (as to effect of disclaimer by trustee); *Re Dyson and Fowke* [1896] 2 Ch 720 (validity of power of sale given by will); *Re Carter and Kenderdine's Contract* [1897] 1 Ch 776, CA (effect of bankruptcy on voluntary settlement); *Re Rumney and Smith* [1897] 2 Ch 351, CA (power of sale by transferee of mortgage); *Re Calcott and Elvin's Contract* [1898] 2 Ch 460, CA (registration of adjudication in bankruptcy in the former Middlesex Deeds Registry); *Re Blaiberg and Abrahams* [1899] 2 Ch 340 (notice of trusts); *Re Hollis' Hospital Trustees and Hague's Contract* [1899] 2 Ch 540 (application of rule against perpetuities); *Re Marshall and Salt's Contract* [1900] 2 Ch 202 (power to assign leaseholds without lessor's consent); *Re Judd and Poland and Skelcher's Contract* [1906] 1 Ch 684, CA (sale of leaseholds in lots by trustees by means of underleases); *Re Lloyds Bank Ltd and Lillington's Contract* [1912] 1 Ch 601 (sale as 'leasehold' of property held on underlease and forming part of property comprised in two head leases); *Re Morrell and Chapman's Contract* [1915] 1 Ch 162 (whether trustees could release from trust legacies: held not a question of title); *Re Kissock and Currie's Contract* [1916] 1 IR 376, Ir CA; *Re Murphy and Griffin's Contract* [1919] 1 IR 187; *Re W & R Holmes and Cosmopolitan Press Ltd's Contract* [1944] Ch 53, [1943] 2 All ER 716 (validity of exercise of power of sale under will); *Horton v Kurzke* [1971] 2 All ER 577, [1971] 1 WLR 769; *MEPC Ltd v Christian-Edwards* [1981] AC 205, [1979] 3 All ER 752, HL (whether, on sale in 1973, there was any likelihood of enforcement of contract of sale made in 1912); *Walia v Michael Naughton Ltd* [1985] 3 All ER 673, [1985] 1 WLR 1115 (whether a general power of attorney entitled donee of the power to transfer as trustee). As to the vendor's obligation to show and prove a good title see PARA 137 ante.

4 See *Re Waddell's Contract* (1876) 2 ChD 172 (survivor of two trustees in bankruptcy); *Re Metropolitan Bank and Jones* (1876) 2 ChD 366 (survivor of two liquidators of a company); *Re Kearley and Clayton's Contract* (1878) 7 ChD 615 (debtor who had entered into composition with his creditors); *Osborne to Rowlett* (1880) 13 ChD 774; *Re Morton and Hallett* (1880) 15 ChD 143, CA (heir of last surviving trustee); *Re Tanqueray-Willaume and Landau* (1882) 20 ChD 465, CA (executor selling freeholds); *Re Whistler* (1887) 35 ChD 561; *Re Venn and Furze's Contract* [1894] 2 Ch 101; *Re Maskell and Goldfinch's Contract* [1895] 2 Ch 525 (assurance of gavelkind land by infant); *Re Verrell's Contract* [1903] 1 Ch 65 (executor selling leaseholds); *Re Crunden and Meux's Contract* [1909] 1 Ch 690 (devisee or executor of last surviving trustee); *Re Cavendish and Arnold's Contract* [1912] WN 83 (executor selling with reservation of minerals).

5 See *Re Ford and Hill* (1879) 10 ChD 365, CA; cf *Re Glenton and Saunders to Haden* (1885) 53 LT 434, CA. As to requisitions on title see PARAS 163-166 ante.

6 See *Re Dudson's Contract* (1878) 8 ChD 628, CA (Fines and Recoveries Act 1833); *Re Bowling and Welby's Contract* [1895] 1 Ch 663, CA (Companies Act 1862 (repealed)); *Re Smith and Stott* (1883) 29 ChD 1009n; *Re Chapman and Hobbs* (1885) 29 ChD 1007; *Re Highett and Bird's Contract* [1903] 1 Ch 287, CA; *Re Taunton and West of England Perpetual Benefit Building Society and Roberts' Contract* [1912] 2 Ch 381 (Conveyancing Act 1881 (repealed)); *Re Harkness and Allsopp's Contract* [1896] 2 Ch 358; *Re Brooke and Fremlin's Contract* [1898] 1 Ch 647 (Married Women's Property Act 1882); *Re Earle and Webster's Contract* (1883) 24 ChD 144; *Re Earl of Strafford and Maples* [1896] 1 Ch 235, CA; *Re Pocock and Pranker's Contract* [1896] 1 Ch 302; *Re Fisher and Grazebrook's Contract* [1898] 2 Ch 660; *Re Mundy and Roper's Contract* [1899] 1 Ch 275, CA (Settled Land Acts (see generally SETTLEMENTS vol 42 (Reissue) PARA 601 et seq)); *Re Pawley and London and Provincial Bank* [1900] 1 Ch 58; *Re Cary and Lott's Contract* [1901] 2 Ch 463; *Re Cohen's Executors and LCC* [1902] 1 Ch 187; *Re Cavendish and Arnold's Contract* [1912] WN 83 (Land Transfer Act 1897 (repealed)); *Re Baroness Bateman and Parker's Contract* [1899] 1 Ch 599 (Consecration of Churchyards Act 1867); *Re Ponsford and Newport District School Board* [1894] 1 Ch 454, CA; *Re Ecclesiastical Comrs and New City of London Brewery Co's Contract* [1895] 1 Ch 702 (Disused Burial Grounds Act 1884); *Corp'n of the Sons of the Clergy and Skinner* [1893] 1 Ch 178 (Charitable Trusts Act 1853 (repealed); Charitable Trusts Amendment Act 1855 (repealed)). As to the relationship of statutes to contracts see STATUTES vol 44(1) (Reissue) PARA 1367; CONTRACT vol 9(1) (Reissue) PARA 867 et seq.

7 See *Whiting to Loomes* (1881) 17 ChD 10, CA.

8 See *Re Johnson and Tustin* (1885) 30 ChD 42, CA (deeds required for purpose of making proper abstract); *Re Willett and Argenti* (1889) 60 LT 735; *Re Stuart and Olivant and Seadon's Contract* [1896] 2 Ch 328, CA (deeds required to verify abstract); *Re Duthy and Jesson's Contract* [1898] 1 Ch 419 (deeds required for purpose of being handed over to purchaser on completion). As to the expenses of the production and inspection of all documents of title not in the possession of the vendor see PARA 171 ante.

9 See *Re Willett and Argenti* (1889) 60 LT 735; *Re Sander and Walford's Contract* (1900) 83 LT 316. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post. As to the expenses of preparing the transfer see PARA 129 ante.

10 See *Re Moody and Yates' Contract* (1885) 30 ChD 344, CA. As to obtaining a surveyor's certificate to prove performance of a building covenant in a lease see BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS vol 4(3) (Reissue) PARA 271; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 448.

11 See *Re Orange and Wright's Contract* (1885) 52 LT 606 (claim by vendor for increase of price due to mistake in quantities); *Re Terry and White's Contract* (1886) 32 ChD 14, CA; *Aspinalls to Powell and Scholefield* (1889) 60 LT 595; *Re Fawcett and Holmes' Contract* (1889) 42 ChD 150, CA; *Re Laitwood's Contract* (1892) 36 Sol Jo 255 (compensation for delay in delivery of possession, and for injury to and deterioration of premises by removal of fixtures and fittings sold with the premises); *Re Hare and O'More's Contract* [1901] 1 Ch 93 (compensation to purchaser for deficiency in quantity). See also *Re Turner and Skelton* (1879) 13 ChD 130 (compensation after completion); cf *Re Leyland and Taylor's Contract* [1900] 2 Ch 625, CA. Damages for the vendor's delay in completion are not 'compensation', and cannot be recovered on an application under the Law of Property Act 1925 s 49 (as amended): see *Re Wilsons and Stevens' Contract* [1894] 3 Ch 546; and PARA 256 post. As to damages generally see DAMAGES.

12 See *Re Cookes' Contract* (1877) 4 ChD 454; *Davies to Jones and Evans* (1883) 24 ChD 190 (beneficiaries on sale by trustees or executors); *Royal Society of London and Thompson* (1881) 17 ChD 407; *Finnis and Young to Forbes and Pochin (No 2)* (1883) 24 ChD 591 (Charity Commissioners); *Re Thompson and Curzon* (1885) 29 ChD 177; *Re Brooke and Fremlin's Contract* [1898] 1 Ch 647 (husband of married woman); *Re Bedingfeld and Herring's Contract* [1893] 2 Ch 332 (incumbrancers and trustee in bankruptcy of tenant for life consenting to sale by trustees); *Re Morrell and Chapman's Contract* [1915] 1 Ch 162 (release from trust legacies). As to parties by whom the assurance is made see PARA 269 post.

13 See *Re Pigott and Great Western Rly Co* (1881) 18 ChD 146. See also *Re Agg-Gardner* (1884) 25 ChD 600 (purchaser's right to acknowledgment and undertaking as to documents); *Re Walmsley and Shaw's Contract* [1917] 1 Ch 93 (insertion of general words). As to the form of transfer see PARA 265 post.

14 See *Re Gray and Metropolitan Rly Co* (1881) 44 LT 567; *Re Monckton and Gilzean* (1884) 27 ChD 555; *Re Mordy and Cowman* (1884) 51 LT 721, CA; *Re Wallis and Barnard's Contract* [1899] 2 Ch 515; *Re Hughes and Ashley's Contract* [1900] 2 Ch 595, CA. As to the proper form of covenant by a purchaser buying subject to restrictions see *Re Poole and Clarke's Contract* [1904] 2 Ch 173, CA; and as to covenants made by the vendor and the purchaser in the transfer generally see PARAS 81 ante, 293 post.

15 See *Re Birmingham and District Land Co and Allday* [1893] 1 Ch 342. See note 13 supra.

16 See *Re Williams and Duchess of Newcastle's Contract* [1897] 2 Ch 144; *Re Jenkins and Commercial Electric Theatre Co's Contract* (1917) 61 Sol Jo 283 (title deeds not in vendor's possession). As to the right to the title deeds of the property sold see PARA 299 post; and as to title deeds not in the vendor's possession see PARA 171 ante.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(5) APPLICATIONS BY VENDOR OR PURCHASER FOR SUMMARY ORDER/(iii) Procedure/227. The application.

### (iii) Procedure

#### 227. The application.



Application under the summary procedure<sup>1</sup> may be made to the court<sup>2</sup>. On such an application, the judge may make such an order as he thinks just, and he can also order how and by whom all or any of the costs<sup>3</sup> of and incident to the application are to be borne and paid<sup>4</sup>.

1 Under the Law of Property Act 1925 s 49 (as amended): see PARA 220 ante.

2 As to the jurisdiction of the courts see PARA 220 note 6 ante. As from 26 April 1999, proceedings are started by the issue of a claim form: see CPR Pts 7, 8. As to the CPR see PARA 133 note 1 ante. As to summary judgment see CPR Pt 24. As to the procedure before that date see RSC Ord 5 r 3; and *Practice Note* [1959] 2 All ER 629, sub nom *Practice Direction* [1959] 1 WLR 743. See also *Re Cooper and Allen's Contract for Sale to Harlech* (1876) 4 ChD 802 at 827 per Jessel MR; *Re Coleman and Jarrom* (1876) 4 ChD 165 at 168; *Re Burroughs, Lynn and Sexton* (1877) 5 ChD 601, CA; *Osborne to Rowlett* (1880) 13 ChD 774 at 781 per Jessel MR; *Re Warner's Settled Estates, Warner to Steel* (1881) 17 ChD 711; *Re Naylor and Spendla's Contract* (1886) 34 ChD 217, CA; *Re Jackson and Woodburn's Contract* (1887) 37 ChD 44 at 47; *Re Bartlett and Berry's Contract* (1897) 76 LT 751; *MEPC Ltd v Christian-Edwards*, [1981] AC 205, [1979] 3 All ER 752, HL. See generally CIVIL PROCEDURE.

3 As to costs see PARA 228 post.

4 See the Law of Property Act 1925 s 49(1); and PARA 220 ante. The judge may direct a reference to chambers as to the form of conveyance (*Re Monckton and Gilzean* (1884) 27 ChD 555 at 564) or the amount of compensation payable (*Aspinalls to Powell and Scholefield* (1889) 60 LT 595).

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### 227 The application

NOTE 2--As to CPR Pt 7 see CIVIL PROCEDURE vol 11 (2009) PARA 116 et seq; as to CPR Pt 8 see CIVIL PROCEDURE vol 11 (2009) PARA 127 et seq; and as to CPR Pt 24 see CIVIL PROCEDURE vol 11 (2009) PARA 524.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(5) APPLICATIONS BY VENDOR OR PURCHASER FOR SUMMARY ORDER/(iii) Procedure/228. Costs.

### 228. Costs.

As a general rule, the costs of the application are ordered to be paid by the party whose contention has not been upheld by the court<sup>1</sup>. If it is decided that the title is good, the purchaser must pay the costs, even though the title is not such as a conveyancer would advise a purchaser to accept without a decision of the court upon it<sup>2</sup>. A vendor who does not exercise his right to rescind directly the application is issued, but does so at a later stage before the hearing, may be ordered to pay the costs of the proceedings, even if the condition giving the right to rescind provides for the return of the deposit without any interest, costs of investigating title, or other compensation or payment whatsoever<sup>3</sup>. Where a vendor is ordered to pay costs, they may be made a charge upon his interest in the property<sup>4</sup>.

1 See *Re Packman and Moss* (1875) 1 ChD 214 at 217; *Re Waddell's Contract* (1876) 2 ChD 172 at 176; *Re Cookes' Contract* (1877) 4 ChD 454 at 463; *Re Ford and Hill* (1879) 10 ChD 365 at 367, 371, CA; *Re Johnson and Tustin* (1885) 30 ChD 42 at 49, CA; *Re Davis and Cavey* (1888) 40 ChD 601 at 609; *Re Ebsworth and Tidy's Contract* (1889) 42 ChD 23 at 53, CA; *Re Starr-Bowkett Building Society and Sibun's Contract* (1889) 42 ChD 375 at 386, CA. As to the liability for costs of a vendor who insists on proceeding by an application under the Law of Property Act 1925 s 49 (as amended) (see PARA 220 ante), although the proper procedure is by application for construction see PARA 223 note 4 ante.

2 See *Osborne to Rowlett* (1880) 13 ChD 774 at 798; *Re Tanqueray-Willaume and Landau* (1882) 20 ChD 465 at 483, CA. Sometimes, however, the purchaser has not been made to pay costs where the question was proper to be submitted to the court (*Re Coward and Adam's Purchase* (1875) LR 20 Eq 179; *Finch v Jukes* [1877] WN 211; *Re Metropolitan District Rly Co and Cosh* (1880) 13 ChD 607 at 613, CA; *Re Great Northern Rly Co and Sanderson* (1884) 25 ChD 788 at 794), or where it is one on which there have been conflicting decisions (*Osborne to Rowlett* supra at 798). As to the vendor's obligation to show and prove a good title see PARA 137 ante. As to conveyancers see PARA 3 ante.

3 See *Re Spindler and Mear's Contract* [1901] 1 Ch 908. As to the vendor's right to rescission see PARAS 232-233 ante; as to the vendor's right to interest on the purchase money see PARAS 194-197 ante; and as to proof of title see PARAS 137-173 ante.

4 See *Re Yeilding and Westbrook* (1886) 31 ChD 344; *Re Higgins and Percival* (1888) 59 LT 213 at 214. As to the purchaser's lien in the property see LIEN vol 68 (2008) PARA 864 et seq.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(5) APPLICATIONS BY VENDOR OR PURCHASER FOR SUMMARY ORDER/(iii) Procedure/229. Appeal.

## 229. Appeal.

Appeal from an order made on an application under these provisions<sup>1</sup> lies to the Court of Appeal<sup>2</sup>, and must be brought within four weeks from the date when the order was sealed or otherwise perfected<sup>3</sup>.

1 I.e. the Law of Property Act 1925 s 49 (as amended): see PARA 220 ante.

2 See the Supreme Court Act 1981 s 16(1). See also CIVIL PROCEDURE.

3 See CPR Sch 1 RSC Ord 59 rr 1, 4(1). As to the CPR see PARA 133 note 1 ante. As to appeals to the Court of Appeal generally see CIVIL PROCEDURE.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information

relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

## **229 Appeal**

NOTE 2--Supreme Court Act 1981 s 16(1) (now Senior Courts Act 1981 s 16(1)) amended: Constitutional Reform Act 2005 Sch 9 para 36(3) (in force on 1 October 2009: SI 2009/1604).

TEXT AND NOTE 3--CPR Sch 1 RSC Ord 59 revoked: SI 2000/221.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(5) APPLICATIONS BY VENDOR OR PURCHASER FOR SUMMARY ORDER/ (iii) Procedure/230. Enforcement of order.

### **230. Enforcement of order.**

Where a party has obtained an order on an application under these provisions<sup>1</sup> which requires something to be done by the other party, and the other party fails to comply, it is usually proper to apply to the court for enforcement of the order, and not to commence an action for specific performance<sup>2</sup>. Where, however, the order does not contain any direction with which a party fails to comply, but merely decides the rights of one or both parties under the contract, an action for specific performance is, it seems, the only remedy open if one party declines to complete the contract<sup>3</sup>.

1    le the Law of Property Act 1925 s 49 (as amended): see PARA 220 ante.

2    See *Thompson v Ringer* (1880) 44 LT 507. As to the mode of enforcing orders see CIVIL PROCEDURE; CONTEMPT OF COURT. As to specific performance see PARAS 247-253 post; and SPECIFIC PERFORMANCE.

3    See *Re Scott and Alvarez's Contract, Scott v Alvarez* [1895] 1 Ch 596 at 610, CA, where this course was adopted, and its propriety does not appear to have been questioned. As to completion of the contract see PARAS 262-325 post.

## **UPDATE**

### **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/(5) APPLICATIONS BY VENDOR OR PURCHASER FOR SUMMARY ORDER/ (iii) Procedure/231. Review of order.

### **231. Review of order.**

In a proper case where, after an order on an application under these provisions<sup>1</sup> is made, fresh matter is for the first time discovered which is material to the questions raised on the application and which could not be produced or used by the party claiming the benefit of it at the time when the order on the application was made, the order may be reviewed, and the question decided on the application reopened. In such circumstances, a judge of the Chancery Division has jurisdiction to review an order of the Court of Appeal<sup>2</sup>.

1 The Law of Property Act 1925 s 49 (as amended): see PARA 220 ante.

2 See *Re Scott and Alvarez's Contract, Scott v Alvarez* [1895] 1 Ch 596 at 610, 622, CA, per Kekewich J; subsequent proceedings [1895] 2 Ch 603 at 611, CA. See also CIVIL PROCEDURE vol 12 (2009) PARA 1177.

## **UPDATE**

### **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/(i) Rescission and Resale by the Vendor/232. Rescission.

## **(6) REMEDIES UNDER AN UNCOMPLETED CONTRACT**

### **(i) Rescission and Resale by the Vendor**

#### **232. Rescission.**

If the contract contains a condition entitling the vendor to rescind on the happening of certain events and those events happen, the vendor may rescind<sup>1</sup>. In the absence of such a condition, the vendor may rescind only if the purchaser's conduct is such as to amount to a repudiation of the contract<sup>2</sup> and the parties can be restored to their former position<sup>3</sup>. A vendor who has claimed rescission and specific performance in the alternative can elect at the hearing for which remedy he will ask<sup>4</sup>.

If the vendor, acting within his rights, rescinds the contract, he may resell the property as owner<sup>5</sup> and retain any excess of price obtained on the resale beyond that fixed by the contract<sup>6</sup>. If the rescission follows a repudiatory breach by the purchaser, the vendor may recover damages<sup>7</sup>, including, if the purchaser has been in possession, an occupation rent<sup>8</sup>. Where the vendor rescinds the contract and resells under his absolute title, the purchaser forfeits the deposit whatever the result of the resale. Any deficiency in the resale price may be recovered by the vendor as damages consequential on a repudiatory breach by the purchaser<sup>9</sup>, but the deposit must be brought into account<sup>10</sup>.

1 See PARAS 87, 104-108, 121 ante. As to the formation of the contract see PARAS 23-40 ante.

2 *Howe v Smith* (1884) 27 ChD 89 at 95, CA, per Cotton LJ. Conduct which would disentitle the purchaser to specific performance does not necessarily amount to a repudiation of the contract. Even though the purchaser has lost his equitable right to specific performance, he may be entitled to treat the contract as subsisting and

recover damages for breach of it: *Cornwall v Henson* [1900] 2 Ch 298, CA. If, after an order for specific performance, the purchaser defaults in paying the purchase money, the vendor is entitled to an order for rescission (*Foligno v Martin* (1853) 16 Beav 586; *Watson v Cox* (1873) LR 15 Eq 219; *Hall v Burnell* [1911] 2 Ch 551) and may recover damages for any loss (*Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL). As to conduct amounting to repudiation see CONTRACT vol 9(1) (Reissue) PARA 997 et seq. As to rescission for misrepresentation or mistake see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 814 et seq; MISTAKE vol 77 (2010) PARA 52 et seq. As to rightful repudiation by the purchaser see PARAS 239-244 post.

3 *Thorpe v Fasey* [1949] Ch 649, [1949] 2 All ER 393.

4 *Farrant v Olver* (1922) 91 LJ Ch 758.

5 *Howe v Smith* (1884) 27 ChD 89, CA.

6 *Ex p Hunter* (1801) 6 Ves 94. As to retention of the deposit see PARAS 234-238 post.

7 *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL, overruling the following cases: *Henty v Schröder* (1879) 12 ChD 666; *Hutchings v Humphreys* (1885) 54 LJ Ch 650; *Jackson v de Kadich* [1904] WN 168; *Barber v Wolfe* [1945] Ch 187, [1945] 1 All ER 399; *Horsler v Zorro* [1975] Ch 302, [1975] 1 All ER 584; and *Capital and Suburban Properties Ltd v Swycher* [1976] Ch 319, [1976] 1 All ER 881, CA. See also *Ogle v Comboyuro Investments Pty Ltd* (1976) 136 CLR 444, Aust HC. As to the measure of damages see PARAS 254-261 post; and as to damages generally see DAMAGES.

8 Cf *Barber v Wolfe* [1945] Ch 187, [1945] 1 All ER 399, overruled in *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL. As to rents and profits see PARA 189 ante; and as to occupation rent see PARA 191 ante.

9 *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL. Where the purchase money is payable by instalments with provision for forfeiture of all the instalments paid on failure to pay any instalment, the provision is in the nature of a penalty, from which relief can be granted (*Kilmer v British Columbia Orchard Lands Ltd* [1913] AC 319, PC), provided the purchaser is ultimately prepared to make good the default and complete the contract. In *Mussen v Van Diemen's Land Co* [1938] Ch 253, [1938] 1 All ER 210, the purchaser was not prepared to make good the default and relief was refused; and in *Stockloser v Johnson* [1954] 1 QB 476, [1954] 1 All ER 630, CA, the purchaser could not recover instalments of the purchase price because he could not satisfy the court that it was unconscionable of the vendor to retain them. See also *Galbraith v Mitchenall Estates Ltd* [1965] 2 QB 473, [1964] 2 All ER 653; *Starside Properties Ltd v Mustapha* [1974] 2 All ER 567, [1974] 1 WLR 816, CA; *Hyundai Shipbuilding and Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep 502, CA; and CONTRACT vol 9(1) (Reissue) PARA 985. If time is of the essence of the contract, the court will not order specific performance unless the condition as to time has been waived: see *Steedman v Drinkle* [1916] 1 AC 275 at 279, PC, explaining *Kilmer v British Columbia Orchard Lands Ltd* [1913] AC 319, PC; and see 'A Conveyancer's Letter: Forfeiture of Instalments of Purchase Money' (1938) 85 Law Journal 169.

10 *Howe v Smith* (1884) 27 ChD 89 at 105, CA, per Fry LJ; *Ockenden v Henly* (1858) EB & E 485. See also PARA 233 note 1 post.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/(i) Rescission and Resale by the Vendor/233. Deficiency on resale.

### 233. Deficiency on resale.

In calculating the deficiency on a resale under a power contained in the contract the purchaser is entitled to be credited with the amount of the deposit<sup>1</sup>. However, this rule only applies where the power of resale is exercised<sup>2</sup>.

1 *Ockenden v Henly* (1858) EB & E 485; *Howe v Smith* (1884) 27 ChD 89, CA; *Shuttleworth v Clews* [1910] 1 Ch 176, pointing out the error in this respect in the order in *Griffiths v Vezev* [1906] 1 Ch 796. See also *Lamond v Davall* (1847) 9 QB 1030; *Catton v Bennett* (1884) 51 LT 70. As to the formation of the contract see PARAS 23-40 ante; and as to the completion of the contract see PARAS 262-325 post.

2 *Essex v Daniell, Daniell v Essex* (1875) LR 10 CP 538 at 550.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/ (ii) Forfeiture of Deposit/234. Deposit.

## (ii) Forfeiture of Deposit

### 234. Deposit.

A deposit paid under a contract of sale<sup>1</sup> serves two purposes: if the sale is completed it counts as part payment of the purchase money, but primarily it is a security for the performance of the contract<sup>2</sup>, and it is usual to provide expressly that, if the purchaser fails to observe the conditions of the contract, the deposit is to be forfeited to the vendor<sup>3</sup>. However, such a provision is not necessary, and, unless the contract taken as a whole shows an intention to exclude forfeiture<sup>4</sup>, the vendor is entitled, by virtue of the purpose of the deposit, to retain it as forfeited, if the contract goes off due to the purchaser's default<sup>5</sup>. If the deposit has been paid to a stakeholder, the vendor can require it to be paid over to himself<sup>6</sup>. The rule as to retention by the vendor applies only to money paid as a deposit, not to instalments of purchase money<sup>7</sup>. By custom, the usual deposit paid is 10 per cent of the purchase price<sup>8</sup>. Forfeiture of a higher deposit may be held void as a penalty<sup>9</sup>.

Where agreement has been reached subject to contract and a deposit has been paid, the deposit must be repaid if no binding contract is executed<sup>10</sup>. An estate agent does not have implied or ostensible authority to receive such a pre-contractual deposit on behalf of the proposed vendor; in the absence of actual authority, therefore, the proposed vendor is not liable for the agent's default in failing to repay the deposit<sup>11</sup>.

1 As to the formation of the contract see PARAS 23-40 ante; and as to the completion of the contract see PARAS 262-325 post.

2 *Depree v Bedborough* (1863) 4 Giff 479 (a sale by auction by court order); *Collins v Stimson* (1883) 11 QBD 142, DC; *Howe v Smith* (1884) 27 ChD 89 at 95, 98, CA; *Soper v Arnold* (1889) 14 App Cas 429 at 435, HL, per Lord Macnaghten; *Levy v Stogdon* [1898] 1 Ch 478 at 485 (affd [1899] 1 Ch 5, CA); *Hall v Burnell* [1911] 2 Ch 551; *Lowe v Hope* [1970] Ch 94 at 97-98, [1969] 3 All ER 605 at 607 per Pennycuik J (approving the statement

in the text). See also *Re A Solicitor* [1966] 3 All ER 52 at 57, [1966] 1 WLR 1604 at 1610 per Pennycuik J. As to the payment of a deposit see PARAS 86-87 ante; and RESTITUTION vol 40(1) (2007 Reissue) PARA 109. Sometimes an insurance backed deposit guarantee scheme is now used instead of a cash deposit.

3 *Gee v Pearce* (1848) 2 De G & Sm 325 at 341. See also PARA 97 ante. If the vendor is a tenant for life selling under his statutory powers, a forfeited deposit is capital money: *Re Ward's Settled Estate* (1919) 63 Sol Jo 319; and see SETTLEMENTS vol 42 (Reissue) PARA 944. Presumably the same would apply to trustees of land, holding for successive beneficiaries, who sell under the powers conferred by the Trusts of Land and Appointment of Trustees Act 1996 s 6: see SETTLEMENTS vol 42 (Reissue) PARA 903; TRUSTS vol 48 (2007 Reissue) PARA 1035.

4 See *Palmer v Temple* (1839) 9 Ad & El 508, where a provision for payment of £1,000 as liquidated damages by either party in default was held to show an intention against forfeiture of a deposit of £300. It was there said that the question of forfeiture depends on the intention of the parties to be collected from the whole instrument (see *Howe v Smith* (1884) 27 ChD 89 at 97, CA), but in practice an exclusion of forfeiture is never intended. Either there is an express clause of forfeiture, or there is simply a payment by way of deposit, and this implies liability to forfeiture (see the Standard Conditions of Sale (3rd Edn), condition 2.2; and PARA 86 ante). As to the Standard Conditions of Sale see PARA 1 note 9 ante.

5 According to the law of vendor and purchaser the inference is that such a deposit (ie a payment of money simply as a 'deposit') is paid as a guarantee for the performance of the contract, and where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit: *Collins v Stimson* (1883) 11 QBD 142 at 143, DC, per Pollock B. See also *Howe v Smith* (1884) 27 ChD 89, CA; *Levy v Stogdon* [1898] 1 Ch 478; *Sprague v Booth* [1909] AC 576 at 580, PC. The law as to forfeiture of deposits applies to sales by the court: *Depree v Bedborough* (1863) 4 Giff 479.

6 The nature of the deposit and the implied terms on which, in the absence of express terms, it is paid, are not affected by the fact that it is paid to a stakeholder instead of to the vendor: *Hall v Burnell* [1911] 2 Ch 551; *Collins v Stimson* (1883) 11 QBD 142 at 143, DC; *Hart v Porthgain Harbour Co Ltd* [1903] 1 Ch 690 at 696. As to payment to a stakeholder see PARA 86 note 1 ante. When the deposit is recovered from the vendor, the court has a discretion to award interest: see PARA 86 text and note 6 ante. As to sales under the Settled Land Act 1925 see 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 364; and SETTLEMENTS vol 42 (Reissue) PARA 827 et seq. If an IOU has been given for the deposit, and the deposit is forfeited, the IOU is evidence to support an action for its recovery by the vendor: *Hinton v Sparkes* (1868) LR 3 CP 161. See also *Cleave v Moore* (1857) 3 Jur NS 48; *Hodgens v Keon* [1894] 2 IR 657, Ir CA; and AUCTION vol 2(3) (Reissue) PARAS 209, 258.

7 See *Cornwall v Henson* [1900] 2 Ch 298 at 302, 305, CA. This distinction between a deposit which is forfeitable on the purchaser's default and a part payment which is returnable is not confined to sales of land: see *Dies v British and International Mining and Finance Corp Ltd* [1939] 1 KB 724; and RESTITUTION vol 40(1) (2007 Reissue) PARAS 108-110. Cf *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 2 All ER 29, [1980] 1 WLR 1129, HL; *Stoczna Gdanska SA v Latvian Shipping Co* [1998] 1 All ER 883, [1998] Lloyd's Rep 609, HL. Subject to his right to retain money paid as a deposit, the vendor on rescinding the contract must give up all benefits which he has enjoyed under it. He must therefore return money paid as part of the purchase money: see *Harrison v Holland* [1922] 1 KB 211, CA; *Mayson v Clouet* [1924] AC 980 at 987, PC, where the contract specially distinguished between deposit and instalments. As to the forfeiture of instalments see PARA 232 note 9 ante.

8 See the Standard Conditions of Sale (3rd Edn), condition 2.2.1; and PARA 86 ante.

9 *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573, [1993] 2 All ER 370, PC (attempt to forfeit 25% deposit void as penalty; court would not allow retention of 10%).

10 *Chillingworth v Esche* [1924] 1 Ch 97, CA. As to the practice of paying a nominal deposit on the signing of a preliminary agreement see PARA 1 ante.

11 *Sorrell v Finch* [1977] AC 728, [1976] 2 All ER 371, HL, overruling *Burt v Claude Cousins & Co Ltd* [1971] 2 QB 426, [1971] 2 All ER 611, CA; *Barrington v Lee* [1972] 1 QB 326, [1971] 3 All ER 1231, CA. As to the duties and liabilities of estate agents see the Estate Agents Act 1979 ss 12-17 (as amended); and AGENCY vol 1 (2008) PARAS 41, 239 et seq.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

### **234 Deposit**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733. Certain persons or indorsements mentioned in this paragraph are specified for the purposes of Regulatory Enforcement and Sanctions Act 2008 s 37, Schs 5, 6 (meaning of 'regulator' for the purposes of imposing civil sanctions), see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 196A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/ (ii) Forfeiture of Deposit/235. Investment of deposit.

### **235. Investment of deposit.**

Where in accordance with the contract the deposit is invested between the dates of sale and completion, the vendor is entitled to any increase, and must bear the loss, if any, in the value of the securities<sup>1</sup>.

<sup>1</sup> *Burroughes v Browne* (1852) 9 Hare 609. As to putting the unpaid balance of purchase money on deposit see PARAS 122, 197 ante. Where a deposit is paid to an agent, including an auctioneer, as stakeholder, it is apparently at the risk of whichever party is ultimately entitled to it; but if the agent receives the deposit as agent for the vendor, it is at the risk of the vendor: see AGENCY vol 1 (2008) PARA 41; AUCTION vol 2(3) (Reissue) PARA 251; but see *Fenton v Browne* (1807) 14 Ves 144 at 150. As to the risk in relation to pre-contractual deposits see PARA 234 text and note 11 ante. As to the formation of the contract see PARAS 23-40 ante; and as to the completion of the contract see PARAS 262-325 post. As to the date of completion see PARAS 120, 185 ante.

## **UPDATE**

### **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/ (ii) Forfeiture of Deposit/236. When right of forfeiture arises.

### **236. When right of forfeiture arises.**

Where the contract gives the vendor an express right of forfeiture on non-performance of the contract or non-observance of its conditions<sup>1</sup>, the right is exercisable when such non-



performance or non-observance is finally ascertained, that is, at the date for performance or observance named in the contract if, but only if<sup>2</sup>, time is of the essence of the contract<sup>3</sup>.

Where the contract gives the vendor no express right of forfeiture, the right is exercisable when, without default on the vendor's part, the purchaser has expressly or impliedly repudiated the contract<sup>4</sup>. An express repudiation gives the vendor an immediate right to retain the deposit as forfeited. There is an implied repudiation if the purchaser fails to complete on the day when he is bound to complete<sup>5</sup>. This is the day, if any, fixed by the contract for completion<sup>6</sup>, if time in this respect is of the essence of the contract<sup>7</sup>. Otherwise, if the purchaser is in default, the vendor can make time of the essence of the contract by giving the purchaser notice to complete at a reasonable date and threatening forfeiture of the deposit on non-completion on that date<sup>8</sup>.

1 As to the formation of the contract see PARAS 23-40 ante.

2 See *Sprague v Booth* [1909] AC 576 at 581, PC.

3 *Lennon v Napper* (1802) 2 Sch & Lef 682. See also *Roberts v Berry* (1853) 3 De GM & G 284; *Tilley v Thomas* (1867) 3 Ch App 61 at 67. As to when time is of the essence of the contract see PARA 120 ante. Where a contract expressly stipulated that the deposit was to be forfeited if the balance of the purchase money was not paid by the date for completion, the purchaser's failure to pay by that date resulted in the loss of the deposit even though time had not been made of the essence: *Warren v Tay Say Geok* (1964) 108 Sol Jo 819, PC.

4 This gives the vendor the right to rescind the contract: see PARA 232 ante.

5 See *Howe v Smith* (1884) 27 ChD 89 at 95, 103, CA; and *Universal Corp'n v Five Ways Properties Ltd* [1979] 1 All ER 552, 38 P & CR 687, CA. As to completion of the contract see PARAS 262-325 post.

6 As to the date of completion see PARAS 120, 185 ante.

7 See PARA 120 ante.

8 See *Cornwall v Henson* [1900] 2 Ch 298, CA; *Green v Sevin* (1879) 13 ChD 589; *Howe v Smith* (1884) 27 ChD 89, CA; *Soper v Arnold* (1889) 14 App Cas 429, HL. It is not enough that, by delay or otherwise, the purchaser has lost the right to specific performance; his conduct must amount to repudiation of the contract on his part (*Howe v Smith* supra at 95 per Cotton LJ), involving the loss of his right to maintain an action for damages (*Howe v Smith* supra at 104 per Fry LJ; see also *Levy v Stogdon* [1898] 1 Ch 478 at 485). Three weeks' notice after two years' delay by the vendors has been held unreasonably short: *Green v Sevin* (1879) 13 ChD 589. See also *Stickney v Keeble* [1915] AC 386, HL, where the vendor, who had caused the delay, was not entitled to forfeit the deposit. Where performance has been long refused, it is not necessary for time to be made of the essence of the contract: *Farrant v Oliver* (1922) 91 LJ Ch 758. Cf *Graham v Pitkin* [1992] 2 All ER 235, [1992] 1 WLR 403, PC, where it was held that unreasonable delay is only one factor in determining whether a party in default had repudiated the contract; but see Harpum 'The Construction of Conditional Contracts and the Effect of Delay in Completion' [1992] Conv 318 at 324-329; Barnsley 'Delayed Completions' [1994] Conv 342; Harpum 'Delayed Completions' [1995] Conv 83. See also *Behzadi v Shaftesbury Hotels Ltd* [1992] Ch 1, [1991] 2 All ER 477, CA. In *Re Barr's Contract, Moorwell Holdings Ltd v Barr* [1956] Ch 551, [1956] 2 All ER 853, 28 days' notice was considered too short where a purchaser had to find £45,000 to complete the purchase. As to the effect of the current standard conditions of sale see PARA 120 ante; as to the measure of damages see PARAS 254-261 post; and as to damages generally see DAMAGES.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/ (ii) Forfeiture of Deposit/237. Rights to rescind and retain deposit.

### **237. Rights to rescind and retain deposit.**

If the vendor becomes entitled to rescind the contract owing to the purchaser's default, he may both rescind and retain the deposit<sup>1</sup>. The contract being thus at an end, the forfeiture of the deposit is not strictly in the nature of damages for breach of contract, although it has been said to be in the nature of liquidated damages and not a penalty<sup>2</sup>. The purchaser is not entitled to terminate the contract by giving up the deposit. Notwithstanding the deposit the vendor can insist on the contract, and sue either for specific performance<sup>3</sup> or for damages beyond the deposit<sup>4</sup>.

Where the purchaser has failed to pay the deposit (or any part of it) before the vendor rescinds the contract, it is uncertain whether the vendor may demand payment of the deposit with a view to its forfeiture<sup>5</sup>.

1 Consequently, upon the purchaser failing to complete in pursuance of a judgment for specific performance, the vendor can obtain an order for rescission of the contract and for forfeiture of the deposit: *Hall v Burnell* [1911] 2 Ch 551 at 555-556, not following *Jackson v De Kadich* [1904] WN 168. See also *Dunn v Vere* (1870) 19 WR 151; *Re Parnell, ex p Barrell* (1875) 10 Ch App 512 (bankruptcy of purchaser); *Olde v Olde* [1904] 1 Ch 35; *Holford v Trim* [1921] WN 243; *Glover v Broome* [1926] WN 46. The court's discretion under the Law of Property Act 1925 s 49(2) seems wide enough to include such a case: see PARA 246 post. If the vendor himself is not ready to complete at the date of the service of a notice, he cannot forfeit the deposit relying on the purchaser's failure: *Cole v Rose* [1978] 3 All ER 1121, DC.

2 *Hinton v Sparkes* (1868) LR 3 CP 161; *Collins v Stimson* (1883) 11 QBD 142 at 144, DC; *Wallis v Smith* (1882) 21 ChD 243 at 258, CA. As to the distinction between a penalty and liquidated damages see *Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573, [1993] 2 All ER 370, PC; paras 254-261 post; and DAMAGES vol 12(1) (Reissue) PARA 1065 et seq.

3 *Crutchley v Jerningham* (1817) 2 Mer 502 at 506. See also *Palmer v Temple* (1839) 9 Ad & El 508. As to specific performance generally see SPECIFIC PERFORMANCE.

4 *Icely v Grew* (1836) 6 Nev & MKB 467. As to resale where a purchaser on a sale by the court fails to complete see 2 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 1007. As to damages generally see DAMAGES.

5 See *Lowe v Hope* [1970] Ch 94, [1969] 3 All ER 605 (vendor cannot demand payment), disapproving *Dewar v Mintoft* [1912] 2 KB 373. See also *Johnson v Jones* [1972] NZLR 313. However, as the vendor's rescission operates only prospectively and does not affect accrued rights (see *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL), it is now clear that the unpaid deposit remains payable: *Damon Cia Naviera SA v Hapag-Lloyd International SA* [1985] 1 All ER 475, [1985] 1 WLR 435, CA (cf *Hyundai Shipbuilding and Heavy Industries Co Ltd v Pournaras* [1978] 2 Lloyd's Rep 502, , CA; *Hyundai Heavy Industries Co Ltd v Papadopoulos* [1980] 2 All ER 29, [1980] 1 WLR 1129, HL; *Stocznia Gdanska SA v Latvian Shipping Co* [1998] 1 All ER 883, [1998] Lloyd's Rep 609, HL). See also *Bot v Ristevski* [1981] VR 120, Vict SC.

## **UPDATE**

### **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/ (ii) Forfeiture of Deposit/238. Rescission after title is accepted.

### **238. Rescission after title is accepted.**

If, by his default in completion after he has accepted the title, the purchaser has given the vendor the right to rescind the contract and retain the deposit as forfeited, and the right has been exercised, the forfeiture is final, and the purchaser cannot recover the deposit on the ground that the vendor's title is subsequently discovered to be defective<sup>1</sup>.

<sup>1</sup> *Soper v Arnold* (1889) 14 App Cas 429, HL. As to the completion of the contract see PARAS 262-325 post.

## **UPDATE**

### **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/ (iii) Repudiation by the Purchaser/239. Repudiation for defect of title or in parcels.

### **(iii) Repudiation by the Purchaser**

#### **239. Repudiation for defect of title or in parcels.**

The purchaser has the right to repudiate the contract immediately upon failure by the vendor to perform something which goes to the root of the contract<sup>1</sup>. The right usually arises upon the vendor's failure to perform his obligation to show and prove a good title<sup>2</sup>. Thus, where the vendor does not deliver a proper abstract<sup>3</sup>, and the purchaser has given reasonable notice fixing a time for its delivery, he can repudiate the contract if the vendor is still in default on the expiration of the notice<sup>4</sup>. Where the vendor shows that he has no intention of answering a requisition going to the root of the title, it is not necessary for the purchaser to give notice making time of the essence of the contract before repudiating<sup>5</sup>. The purchaser may also repudiate as soon as he finds that the vendor is able neither to transfer the property himself, nor to compel any other person to do so, and the purchaser is not bound to wait to see whether the vendor can induce some third person, who has the power, to join in making a good title to the property<sup>6</sup>. The rule does not apply to a defect of conveyance as distinguished from a defect of title<sup>7</sup>.

Similarly, where the property which the vendor can transfer is not substantially the same as the property contracted to be sold<sup>8</sup>, the purchaser can repudiate. Trifling defects in the property may be regarded by the court merely as matters for compensation<sup>9</sup>.

<sup>1</sup> This is in accordance with the rule applicable to contracts generally: *Mersey Steel and Iron Co v Naylor, Benzon & Co* (1884) 9 App Cas 434 at 443, HL; *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL. See also *Re McLoughlin and M'Grath's Contract* (1914) 48 ILT 87, Ir CA; and CONTRACT vol 9(1) (Reissue) PARA 997 et

seq. A purchaser cannot both repudiate and insist on the contract: *Smith v Butler* [1900] 1 QB 694 at 698, CA. The purchaser cannot terminate the contract by giving up the deposit: see PARA 237 ante. As to wrongful repudiation by the purchaser see PARAS 232, 236 ante; and as to the rule that the purchaser cannot repudiate without the leave of the court after a judgment for specific performance see PARA 242 note 2 post.

2 As to this obligation see PARAS 137-173 ante. The title to be shown by the vendor must be such as was stipulated, ie it must commence with the specified document or at the specified date: *Re Head's Trustees and Macdonald* (1890) 45 ChD 310, CA; *Bellamy v Debenham* [1891] 1 Ch 412, CA; and see PARA 90 ante. However, the vendor is not restricted by the contract as to the mode of making title if another mode is equally efficacious: *Re Spencer and Hauser's Contract* [1928] Ch 598; and see PARA 92 ante. A proviso that, if the vendor cannot deduce a good title or the purchaser does not pay the purchase money on the appointed day, the contract is to be void gives the vendor an option to rescind on non-payment and the purchaser an option to rescind on the vendor's failure to make good title, but not vice versa: *Roberts v Wyatt* (1810) 2 Taunt 268. As to the purchaser being bound to take a possessory title see PARA 143 ante. As to the vendor's duty to disclose material facts see PARAS 41-44 ante. As to misdescription and misrepresentation see PARAS 51-52, 109-116 ante.

3 See *Re Priestley and Davidson's Contract* (1892) 31 LR Ir 122. As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 ante.

4 *Venn v Cattell* (1872) 27 LT 469; *Compton v Bagley* [1892] 1 Ch 313, where 14 days was held to be a reasonable time, having regard to previous requests for the delivery of the abstract, and to the nature of the property (a farm of which the purchaser was to have early possession). See also *Stickney v Keeble* [1915] AC 386, HL; and *Re Bayley and Shoesmith's Contract* (1918) 87 LJ Ch 626. The purchaser cannot repudiate if, after such notice, he receives the abstract and keeps it without objection: *Seton v Slade*, *Hunter v Seton* (1802) 7 Ves 265.

5 *Re Stone and Saville's Contract* [1963] 1 All ER 353, [1963] 1 WLR 163, CA.

6 *Forrer v Nash* (1865) 35 Beav 167; *Brewer v Broadwood* (1882) 22 ChD 105; *Wylson v Dunn* (1887) 34 ChD 569 at 577; *Lee v Soames* (1888) 36 WR 884; *Re Bryant and Barningham's Contract* (1890) 44 ChD 218, CA; *Re Head's Trustees and Macdonald* (1890) 45 ChD 310, CA; *Bellamy v Debenham* [1891] 1 Ch 412 at 420, CA; *Warren v Moore* (1897) 14 TLR 138 (affd (1898) 14 TLR 497, CA); *Re Cooke and Holland's Contract* (1898) 78 LT 106; *Powell v Marshall, Parkes & Co* [1899] 1 QB 710, CA; *Smith v Butler* [1900] 1 QB 694 at 700, CA; *Re Hucklesby and Atkinson's Contract* (1910) 102 LT 214 at 217. The right to repudiate applies both at law and in equity: *Pips (Leisure Productions) Ltd v Walton* (1982) 43 P & CR 415; and see PARA 243 post. Cf *Boehm v Wood* (1820) 1 Jac & W 419 at 421; *Forster v Hoggart* (1850) 15 QB 155. The purchaser may not repudiate when the vendor, as and when he pleases, can compel others to perfect his title: see *Elliott and H Elliott (Builders) Ltd v Pierson* [1948] Ch 452, [1948] 1 All ER 939, where title to the leasehold was shown, but the vendor could compel the freeholder to join in.

As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

7 *Hatten v Russell* (1888) 38 ChD 334 at 347 (cited in SETTLEMENTS vol 42 (Reissue) PARA 775); *Re Hucklesby and Atkinson's Contract* (1910) 102 LT 214; *Brickles v Snell* [1916] 2 AC 599, PC (where the mortgagee was willing to receive the mortgage money on completion, and the vendor was held to be ready (ie able) to convey); and see PARA 245 note 1 post. As to what amounts to a defect of title see PARA 57 ante.

8 *Portman v Mill* (1826) 2 Russ 570; *Flight v Booth* (1834) 1 Bing NC 370; *Re Arnold, Arnold v Arnold* (1880) 14 ChD 270, CA; *Re Fawcett and Holmes' Contract* (1889) 42 ChD 150, CA; *Jacobs v Revell* [1900] 2 Ch 858; *Lee v Rayson* [1917] 1 Ch 613. See *Hearn v Tomlin* (1793) Peake 253; *Gardiner v Tate* (1876) 10 CL 460; paras 51-52, 109-116 ante; and SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARAS 894, 898, 922.

9 *Shepherd v Croft* [1911] 1 Ch 521 (latent defect: watercourse under property). Cf *Re Brewer and Hankins's Contract* (1899) 80 LT 127, CA; *Re Puckett and Smith's Contract* [1902] 2 Ch 258, CA; and see *Carlish v Salt* [1906] 1 Ch 335. See further PARAS 51-52 ante. But a possible liability to what is now inheritance tax is not a trifling defect: *Manning v Turner* [1956] 3 All ER 641, [1957] 1 WLR 91 (estate duty). As to inheritance tax see generally INHERITANCE TAXATION.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/ (iii) Repudiation by the Purchaser/240. Completion depending on third person.

#### **240. Completion depending on third person.**

Where the completion of the contract<sup>1</sup> depends on the consent of a third person (where, for instance, the vendor of leasehold property requires a licence to assign<sup>2</sup>), the vendor is not bound to procure the consent before the date for completion<sup>3</sup>, and the purchaser cannot repudiate earlier on the ground that the consent has not been obtained unless there are special circumstances entitling him to treat the contract as at an end (if, for instance, he can prove, or the vendor has admitted, that the consent cannot be obtained by the due date<sup>4</sup>). If the date by which a condition is to be fulfilled is fixed, either specifically by the contract or impliedly by reference to the date fixed for completion, the time allowed for fulfilling the condition will not be extended by the equitable principles which can apply to extending the time for the general completion of the contract<sup>5</sup>. If there is no fixed date, a reasonable time must be allowed for the fulfilment of the condition<sup>6</sup>.

<sup>1</sup> As to the formation of the contract see PARAS 23-40 ante; and as to the completion of the contract see PARAS 262-325 post.

<sup>2</sup> As to the vendor's duty to obtain the necessary licence and the unenforceability of the contract if he fails in his duty see PARA 25 ante; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 547. As to damages to the purchaser for loss of his bargain on the vendor's default in procuring consent see PARA 256 post. See, however, the Standard Conditions of Sale (3rd Edn), which states that unless there has been a breach of obligation in relation to the obtaining of the licence (see condition 8.3.2(a), (b)), either party may rescind the contract by notice to the other party if three working days before completion date (1) the consent has not been given; or (2) the consent has been given subject to a condition to which the purchaser reasonably objects: see condition 8.3.4. In that case, neither party is to be treated as in breach of contract (see condition 8.3.4) and either may rescind the contract (a) unless the rescission is a result of the purchaser's breach of contract the deposit is to be repaid to the purchaser with accrued interest (see condition 7.2(a)); and (b) the buyer is to return any documents he received from the vendor and is to cancel any registration of the contract (see condition 7.2(b)). Condition 8.3.4 in effect neutralises *29 Equities Ltd v Bank Leumi (UK) Ltd* [1987] 1 All ER 108, [1986] 1 WLR 1490, CA. As to the Standard Conditions of Sale see PARA 1 note 9 ante.

<sup>3</sup> *Ellis v Rogers* (1885) 29 ChD 661 at 671-672, CA. See also *Stowell v Robinson* (1837) 3 Bing NC 928; and *Property and Bloodstock Ltd v Emerton* [1968] Ch 94, [1967] 3 All ER 321, CA. Cf *Dotesio v Biss* (1912) 56 Sol Jo 612, CA. As to the date for completion see PARAS 120, 185 ante.

<sup>4</sup> *Smith v Butler* [1900] 1 QB 694 at 699, CA. Where the sanction of the court is required, and no date is fixed for obtaining the sanction, it must be obtained before the time fixed for completion: *Re Sandwell Park Colliery Co, Field v Sandwell Park Colliery Co* [1929] 1 Ch 277.

<sup>5</sup> *Aberfoyle Plantations Ltd v Cheng* [1960] AC 115, [1959] 3 All ER 910, PC (purchase conditional on renewal of leases).

<sup>6</sup> *Re Longlands Farm, Long Common, Botley, Hants, Alford v Superior Developments Ltd* [1968] 3 All ER 552, 20 P & CR 25.

#### **UPDATE**

#### **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information

relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

## 240 Completion depending on third person

NOTE 2--Prior written consent does not require any particular formality, but it must be clearly indicated by correspondence: *Aubergine Enterprises Ltd v Lakewood International Ltd* [2002] EWCA Civ 177, [2002] 1 WLR 2149. A party will lose its right to rescind if it not exercised promptly: *Alchemy Estates Ltd v Astor* [2008] EWHC 2675 (Ch), [2009] 1 WLR 940, [2008] All ER (D) 35 (Nov).

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/ (iii) Repudiation by the Purchaser/241. When right to repudiate must be exercised.

### 241. When right to repudiate must be exercised.

Where a purchaser desires to exercise his right of repudiation, which arises as soon as the vendor's defect of title is ascertained either from the abstract or from his replies to the purchaser's requisitions<sup>1</sup>, then, unless the defect is slight and can be properly met by compensation<sup>2</sup>, he must indicate his election to do so with every reasonable dispatch<sup>3</sup>. If the purchaser continues in negotiation as to the title, and thus treats the contract as subsisting<sup>4</sup>, he cannot repudiate at any subsequent moment he may choose<sup>5</sup>, but must give the vendor a reasonable time to remedy the defect<sup>6</sup>. Where the defect is irremovable, but the purchaser treats the contract as subsisting, he waives his right to repudiate and his only remedy is in damages<sup>7</sup>.

1 See *Lee v Soames* (1888) 36 WR 884; *Weston v Savage* (1879) 10 ChD 736; *Maconchy v Clayton* [1898] 1 IR 291 at 306, Ir CA; *Re Stone and Saville's Contract* [1963] 1 All ER 353, [1963] 1 WLR 163, CA; and *Pips (Leisure Productions) Ltd v Walton* (1982) 43 P & CR 415. As to rescission on the vendor's refusal to comply with a requisition as to conveyance see *Denny v Hancock* (1870) 6 Ch App 1 at 13. The purchaser may repudiate even if the answer to a requisition is in accordance with conveyancing practice: *Simmons v Pennington & Son (a firm)* [1955] 1 All ER 240, [1955] 1 WLR 183, CA. As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 ante. As to requisitions on title see PARAS 163-166 ante.

2 *Halkett v Earl of Dudley* [1907] 1 Ch 590 at 596. See also *Rudd v Lascelles* [1900] 1 Ch 815; *Jacobs v Revell* [1900] 2 Ch 858; and PARA 239 ante.

3 *Berners v Fleming* [1925] Ch 264, CA.

4 As to the formation of the contract see PARAS 23-40 ante; and as to the completion of the contract see PARAS 262-325 post.

5 *Hoggart v Scott* (1830) 1 Russ & M 293; *Eyston v Simonds* (1842) 1 Y & C Ch Cas 608; *Salisbury v Hatcher* (1842) 2 Y & C Ch Cas 54 at 66; *Murrell v Goodyear* (1860) 1 De GF & J 432; *Halkett v Earl of Dudley* [1907] 1 Ch 590 at 596; *Berners v Fleming* [1925] Ch 264, CA; *Elliott and H Elliott (Builders) Ltd v Pierson* [1948] Ch 452, [1948] 1 All ER 939.

6 *Murrell v Goodyear* (1860) 1 De GF & J 432 at 450 per Turner LJ. See also *Thomson v Miles* (1794) 1 Esp 184; *Manning v Turner* [1956] 3 All ER 641, [1957] 1 WLR 91 (liability to death duty). As to making time of the essence of the contract by notice see *Taylor v Brown* (1839) 2 Beav 180; *Wood v Machu* (1846) 5 Hare 158; *Nott v Riccard* (1856) 22 Beav 307; and PARA 120 ante. See further *Royou v Paul* (1858) 28 LJ Ch 555; *Laughton v Port Erin Comrs* [1910] AC 565 at 569, PC.

7 See eg *Aquis Estates Ltd v Minton* [1975] 3 All ER 1043, [1975] 1 WLR 1452, CA. As to the damages recoverable by the purchaser see PARAS 256-258 post; and as to damages generally see DAMAGES.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/ (iii) Repudiation by the Purchaser/242. Restrictions on repudiation.

#### 242. Restrictions on repudiation.

The purchaser may not repudiate the contract if he has been informed by the vendor of the defect in the title, and that it will not be cured without some delay<sup>1</sup>.

After a judgment for specific performance the purchaser may not repudiate the contract without the leave of the court<sup>2</sup>. In such circumstances, on the discovery of the defect in title, he should move to be discharged from the contract<sup>3</sup>. The court's jurisdiction is discretionary and, where the defect is one capable of being remedied, the court will not as a rule make a final declaration of the vendor's inability to make a good title or discharge the purchaser from the contract without first affording to the vendor a reasonable time to remedy the defect<sup>4</sup>.

1 *Wylson v Dunn* (1887) 34 ChD 569 at 578. See also *Hoggart v Scott* (1830) 1 Russ & M 293; *Weston v Savage* (1879) 10 ChD 736.

2 *Halkett v Earl of Dudley* [1907] 1 Ch 590. Similarly, after a full decree of specific performance a contractual notice to complete may not be served: *Sudagar Singh v Nazeer* [1979] Ch 474, [1978] 3 All ER 817. See also SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 922. As to a notice to complete see PARA 121 ante.

3 *Halkett v Earl of Dudley* [1907] 1 Ch 590 at 601.

4 *Cleaddon Trust Ltd v Davis* [1940] Ch 940, [1940] 3 All ER 648, CA, where the vendor was allowed a limited time to obtain the release of restrictions (applying principles stated in *Halkett v Earl of Dudley* [1907] 1 Ch 590 at 601-602; *Coffin v Cooper* (1807) 14 Ves 205). See also *Jenkins v Hiles* (1802) 6 Ves 646; and *Wynn v Morgan* (1802) 7 Ves 202.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/ (iii) Repudiation by the Purchaser/243. Nature of right to repudiate.

### 243. Nature of right to repudiate.

Rightful repudiation by the purchaser is available as a defence to an action by the vendor for specific performance<sup>1</sup>, and in this aspect it depends on the doctrine of mutuality in the contract<sup>2</sup>. However, in accordance with general contractual principles<sup>3</sup>, the repudiation appears also to operate as a rescission of the contract at law so as to entitle the purchaser to maintain an action for a declaration of rescission and the return of the deposit<sup>4</sup>, and to be available as a defence to the vendor's action for breach of contract on non-completion at the proper time<sup>5</sup>.

1 *Bellamy v Debenham* [1891] 1 Ch 412 at 420, CA. See also *Royou v Paul* (1858) 28 LJ Ch 555. As to the remedy of specific performance see PARAS 247-253 post; and as to defences to an action of specific performance generally see SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 841 et seq.

2 *Wylson v Dunn* (1887) 34 ChD 569 at 577; *Bolton Partners v Lambert* (1888) 41 ChD 295 (on appeal (1889) 41 ChD 302, CA); *Halkett v Earl of Dudley* [1907] 1 Ch 590 at 596. See also SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARAS 809-910.

3 See *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL; and CONTRACT vol 9(1) (Reissue) PARA 997 et seq.

4 *Weston v Savage* (1879) 10 ChD 736 at 741; *Lee v Soames* (1888) 36 WR 884; and see PARAS 245-246 post. In *Procter v Pugh* [1921] 2 Ch 256, the vendor was allowed to take advantage of a clause enabling him to rescind the contract, notwithstanding that the purchaser had previously repudiated it for defect of title. See the criticism of this decision in Williams 'A Purchaser's Right of Repudiation' (1921) 66 Sol Jo 135-138.

5 *Brewer v Broadwood* (1882) 22 ChD 105; *Pips (Leisure Productions) Ltd v Walton* (1982) 43 P & CR 415 (discussing, inter alia, *Bellamy v Debenham* [1891] 1 Ch 412, CA); *Halkett v Earl of Dudley* [1907] 1 Ch 590. See also *Procter v Pugh* [1921] 2 Ch 256 at 268; 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 203 note (k); and see generally Harpum 'Selling without Title: A Vendor's Duty of Disclosure' (1992) 108 LQR 280. As to completion of the contract see PARAS 262-325 post.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/ (iii) Repudiation by the Purchaser/244. Restitutio in integrum.

### 244. Restitutio in integrum.

Unless restitutio in integrum can substantially be made, the purchaser cannot exercise his right of rescission on the ground of the vendor's default<sup>1</sup>. Thus a lessee of mines who continues to work the mines after warning of circumstances which would entitle him to set aside the lease cannot exercise such right<sup>2</sup>.

1 *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, HL; *Thorpe v Fasey* [1949] Ch 649, [1949] 2 All ER 393.



2 *Vigers v Pike* (1842) 8 Cl & Fin 562 at 650, HL.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/(iv) Recovery of Deposit by the Purchaser/245. Right to recover deposit.

### (iv) Recovery of Deposit by the Purchaser

#### 245. Right to recover deposit.

Where the vendor makes a default in performing his part of the contract<sup>1</sup> which entitles the purchaser to rescind the contract<sup>2</sup>, the purchaser can recover the deposit with interest at an appropriate rate fixed by the conditions of sale<sup>3</sup>, or, in default, determined by the court, or such other rate as may be agreed<sup>4</sup>. In addition, the purchaser can obtain damages<sup>5</sup>, which will include his expenses to date<sup>6</sup>, the costs of the agreement itself<sup>7</sup> and the costs of investigating the title<sup>8</sup>. The fact that the purchaser has by delay lost the right to specific performance does not prevent him from recovering the deposit<sup>9</sup>. Where a deposit has been paid to a third person as agent for the vendor and not as stakeholder, it can be recovered only from the vendor and not from the third person personally<sup>10</sup>.

1 Eg by not performing, before the date fixed for completion, work of such a nature as to make time of the essence of the contract (*Bernard v Williams* (1928) 139 LT 22, DC), or by failing to make a good title (*Edwards v Hodding* (1814) 5 Taunt 815; *Gray v Gutteridge* (1828) 1 Man & Ry KB 614; *Want v Stallibrass* (1873) LR 8 Exch 175; *Hone v Gakstatter* (1909) 53 Sol Jo 286 (failure to disclose restrictive covenants) (see PARA 137 ante)). If the vendor has a good title, but has not satisfied the purchaser that he can transfer (where eg he himself is entitled under an uncompleted contract), this does not enable the purchaser to repudiate the contract and recover his deposit: *Re Hucklesby and Atkinson's Contract* (1910) 102 LT 214; *Gordon Hill Trust Ltd v Segall* [1941] 2 All ER 379, CA. To repudiate the contract for the vendor's want of title, it must appear that the vendor has no title in himself, and cannot compel third persons to supply him with a title: *Re Hucklesby and Atkinson's Contract* supra. See also PARA 239 ante. As to the formation of the contract see PARAS 23-40 ante.

2 See PARAS 239-244 ante. See also *Schindler v Pigault* (1975) 30 P & CR 328, where the vendor refused to allow access to the sub-purchaser until after the date for completion and then refused to complete late, and it was held that the purchaser was entitled to rescind and to recover his deposit. As to repudiation operating as a rescission of contract see PARA 243 ante. An omission by the vendor to disclose a material fact may deprive him of his right to specific performance, but, unless the purchaser is entitled to rescind, the contract will stand at law and the purchaser will not be able to recover his deposit: *Beyfus v Lodge* [1925] Ch 350. As to the date for completion see PARAS 120, 185 ante; and as to completion see PARAS 262-325 post.

3 As to the contract rate see the Standard Conditions of Sale (3rd Edn), condition 1.1.1(g); and PARA 119 note 7 ante. As to the Standard Conditions of Sale see PARA 1 note 9 ante.

4 *Day v Singleton* [1899] 2 Ch 320 at 327, CA; *Powell v Marshall, Parkes & Co* [1899] 1 QB 710, CA; *Warren v Moore* (1898) 14 TLR 497, CA. In *Weston v Savage* (1879) 10 ChD 736, interest was allowed at 5% per annum, but 4% was the usual rate: *Re Bryant and Barningham's Contract* (1890) 44 ChD 218 at 222, CA, per Kay J. However, a more realistic rate would probably now be awarded: see *Wallersteiner v Moir (No 2)* [1975] QB 373, [1975] 1 All ER 849, CA; *Bartlett v Barclays Bank Trust Co Ltd (No 2)* [1980] Ch 515 at 547, [1980] 2 All ER 92 at

98 per Brightman LJ; and PARA 195 text and notes 3-4 ante. In equity no prior demand is necessary for the recovery of interest: see 2 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 1005 note (p). As to repayment of the deposit where the vendor has a bad title see PARA 103 ante; and as to the purchaser's lien for his deposit see PARA 184 ante; and LIEN vol 68 (2008) PARAS 864-865.

5 See *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL; and DAMAGES.

6 See *Gosbell v Archer* (1835) 2 Ad & El 500.

7 See *Pearl Life Assurance Co v Buttenshaw* [1893] WN 123.

8 *Re Bryant and Barningham's Contract* (1890) 44 ChD 218, CA; *Re Hare and O'More's Contract* [1901] 1 Ch 93 at 96; *Re Walker and Oakshott's Contract* [1901] 2 Ch 383 at 387 (affd [1902] WN 147, CA); and see PARA 222 text and note 3 ante. *Re Walker and Oakshott's Contract* supra was overruled on another point by *Re Judd and Poland and Skelcher's Contract* [1906] 1 Ch 684, CA. See also PARA 257 post. As to whether the purchaser can recover substantial damages for loss of bargain see PARA 258 post.

9 *Levy v Stogdon* [1898] 1 Ch 478; affd [1899] 1 Ch 5, CA.

10 See *Ellis v Goulton* [1893] 1 QB 350, CA; and PARA 86 ante. Where, however, the third person received the money as stakeholder, the deposit can be recovered from the third person if the purchaser has become entitled to its return: see *Ryan v Pilkington* [1959] 1 All ER 689, [1959] 1 WLR 403, CA; and *Goding v Frazer* [1966] 3 All ER 234, [1967] 1 WLR 286. A vendor who has not authorised his agent to employ a sub-agent will not be liable for the defaults of the sub-agent: *Maloney v Hardy and Moorshead* (1970) 216 Estates Gazette 1582, CA. As to the recovery of a deposit from an auctioneer see AUCTION vol 2(3) (Reissue) PARAS 250-251. As to the capacity in which a solicitor receives a deposit see PARA 86 ante; and LEGAL PROFESSIONS vol 66 (2009) PARA 790.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/(iv) Recovery of Deposit by the Purchaser/246. When the right to recover the deposit arises.

#### 246. When the right to recover the deposit arises.

The purchaser's right to recover his deposit is a legal right which springs out of breach of contract by the vendor<sup>1</sup>. Formerly, where there had been no breach of contract, the vendor was not liable to return the deposit<sup>2</sup>, notwithstanding that he was not entitled to specific performance<sup>3</sup>. Thus a defect in title to which the purchaser was by the conditions precluded from objecting<sup>4</sup>, or mere delay<sup>5</sup>, might prevent the vendor from obtaining specific performance without rendering him liable to return the deposit<sup>6</sup>. Now, however, where the court refuses to grant specific performance of a contract for the sale or exchange of any interest in land<sup>7</sup>, or in any action for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit<sup>8</sup>. Thus the court is no longer bound to refuse to order the return of the deposit if the vendor is at law protected by the conditions of sale, but may exercise its discretion in the matter<sup>9</sup>. However, the court's discretion is not limited to such a case; there is an unqualified discretion to order the return of the deposit where that is the fairest course between the two parties<sup>10</sup>. The factors to be taken into account include a general consideration of the conduct of the parties (and especially the applicant), the gravity of the matters in question, and the

amounts at stake<sup>11</sup>. The court's order for the return of the deposit does not extinguish the vendor's right to claim damages for breach of contract<sup>12</sup>.

1 Cf *Howe v Smith* (1884) 27 ChD 89, CA; and see *Farrer v Nightingal* (1798) 2 Esp 639. As to the formation of the contract see PARAS 23-40 ante. As to discharge of contractual promises generally see CONTRACT vol 9(1) (Reissue) PARA 920 et seq.

2 *Best v Hamand* (1879) 12 ChD 1, CA.

3 *Re Davis and Cavey* (1888) 40 ChD 601 at 607. As to the remedy of specific performance see PARAS 247-253 post; and SPECIFIC PERFORMANCE.

4 *Re Scott and Alvarez's Contract, Scott v Alvarez* [1895] 2 Ch 603, CA. See also *Re National Provincial Bank of England and Marsh* [1895] 1 Ch 190.

5 *Southcomb v Bishop of Exeter* (1847) 6 Hare 213 at 227.

6 Before the union of the courts of law and equity (see EQUITY vol 16(2) (Reissue) PARA 401), a court of equity, on dismissing the vendor's suit for specific performance, would order a return of the deposit if it was clear that the vendor had lost his legal rights under the contract, but not otherwise (*Southcomb v Bishop of Exeter* (1847) 6 Hare 213), and a decree might be made for specific performance even after the purchaser had recovered the deposit at law (*Hoggart v Scott* (1830) 1 Russ & M 293, where at the date of the contract the vendor had no title, but the purchaser did not at once repudiate, and the title was subsequently completed).

7 For the meaning of 'land' see PARA 139 note 1 ante.

8 Law of Property Act 1925 s 49(2), (3). It has been questioned whether the court can order the return of part of the deposit: see *James Macara Ltd v Barclay* [1944] 2 All ER 31 at 32 (affd without reference to this point [1945] KB 148, [1944] 2 All ER 589, CA); and see *Dimsdale Developments (South East) Ltd v De Haan* (1983) 47 P & CR 1, [1984] Conv 312 (showing how this limitation can, in appropriate circumstances, be avoided). Where a contract expressly excludes the operation of the Law of Property Act 1925 s 49(2), the vendor cannot automatically claim forfeiture of the purchaser's deposit: see *Country and Metropolitan Homes Surrey Ltd v Topclaim Ltd* [1996] Ch 307, [1997] 1 All ER 254.

9 The effect of *Charles Hunt Ltd v Palmer* [1931] 2 Ch 287 is to overrule *Re Scott and Alvarez's Contract, Scott v Alvarez* [1895] 2 Ch 603, CA, which was a striking instance of the unfairness of the former doctrine: see Williams on Contract of Sale of Land (1930 Edn) XV, 93-94. See also *Faruqi v English Real Estates Ltd* [1979] 1 WLR 963, 38 P & CR 318.

10 *Schindler v Pigault* (1975) 30 P & CR 328; *Universal Corpn v Five Ways Properties Ltd* [1979] 1 All ER 552, 38 P & CR 687, CA; *Maktoum v South Lodge Flats Ltd* (1980) Times, 22 April.

11 See *Schindler v Pigault* (1975) 30 P & CR 328 (where the vendor, who had not afforded access to the sub-purchaser, could not rely on the purchaser's failure to complete by the specified date as a defence to the purchaser's action for rescission, and it was just and equitable for the deposit to be returned); *Universal Corpn v Five Ways Properties Ltd* [1979] 1 All ER 552, 38 P & CR 687, CA (where the purchaser had an arguable case for the return of the deposit where failure to complete was due to a change in Nigerian exchange control regulations which delayed transmission of the purchase money); *Maktoum v South Lodge Flats Ltd* (1980) Times, 22 April (where the purchaser failed to execute underleases within the time for completion, and the deposit was repaid without interest). Cf *Cole v Rose* [1978] 3 All ER 1121 at 1130, DC; *Safehaven Investments Inc v Springbok Ltd* (1995) 71 P & CR 59.

12 *Dimsdale Developments (South East) Ltd v De Haan* (1983) 47 P & CR 1. As to an action for damages see PARAS 254-261 post; and as to damages generally see DAMAGES.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

## 246 When the right to recover the deposit arises

NOTE 8--The statutory discretion will be exercised only in exceptional circumstances where the purchaser himself has failed to perform: *Omar v El-Wakil* [2001] EWCA Civ 1090, [2002] 2 P & CR 36, CA. See also *Midill (97PL) Ltd v Park Lane Estates Ltd* [2008] EWCA Civ 1227, [2009] 2 All ER 1067 (subsequent sale of property at higher price not exceptional circumstance). The 1925 Act s 49(2) confers jurisdiction on the courts to exercise a discretion, and any contractual provision purporting to oust this jurisdiction is void: *Aribisala v St James Homes (Grosvenor Dock) Ltd* [2007] 25 EG 183 (CS).

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/ (v) Specific Performance/247. Remedy of specific performance.

### (v) Specific Performance

#### 247. Remedy of specific performance.

Specific performance<sup>1</sup> of a contract is ordered at the court's discretion<sup>2</sup> where damages do not afford a complete remedy<sup>3</sup>. Although, since a vendor's claim is, strictly speaking, merely a pecuniary demand, damages would sufficiently compensate him, the court acts on the principle that the remedy must be mutual, and, therefore, specifically enforces the contract at the suit of the vendor in every case where a similar remedy is open to the purchaser<sup>4</sup>. In an action for specific performance, the court will decide questions which are mere questions of the construction of a document and will not refuse to do so on the ground that the title is too doubtful to force on a purchaser<sup>5</sup>. However, the court will not decide such questions where they can be decided only on the receipt of the evidence of witnesses unknown to the purchaser<sup>6</sup>. An agreement can be rectified on the ground of mistake and in the same action specific performance ordered of the agreement as rectified<sup>7</sup>. Where the circumstances justify equity's intervention, specific performance may be granted in an action begun before the date for completion<sup>8</sup>. Once that date has passed, the claimant may commence the action without serving a notice to complete<sup>9</sup>.

A party who obtains an order for specific performance does not elect irrevocably to affirm the contract, for, if it becomes impossible to enforce it, that party may ask the court to discharge the order and terminate the contract and damages may then be awarded<sup>10</sup>.

The court does not specifically enforce an agreement to enter into a contract for the sale of land<sup>11</sup>.

Where a contract is made between two parties for the benefit of a third person, in an action by one of the contracting parties specific performance may be decreed in favour of the third person<sup>12</sup>.

In an action for specific performance where there is also a claim for damages the court may award damages for delay in completion even though the action was begun before the date for completion and thus before the cause of action in damages had accrued<sup>13</sup>.

1 As to specific performance generally see SPECIFIC PERFORMANCE. See also PARA 248 et seq post. As to the specific performance of a contract relating to registered land see LAND REGISTRATION vol 26 (2004 Reissue) PARA 827.

2 *Cox v Middleton* (1854) 2 Drew 209; *Haywood v Cope* (1858) 25 Beav 140 at 151; *Re Scott and Alvarez's Contract, Scott v Alvarez* [1895] 2 Ch 603 at 615, CA, per Rigby LJ. As to the form of order in an action for

specific performance see *Cooper v Morgan* [1909] 1 Ch 261; *Palmer v Lark* [1945] Ch 182, [1945] 1 All ER 355; and SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 933. The appointment of a receiver does not of itself afford a vendor company a defence to a claim by the purchaser for specific performance: *Freevale Ltd v Metrostore (Holdings) Ltd* [1984] Ch 199, [1984] 1 All ER 495.

3 *Adderley v Dixon* (1824) 1 Sim & St 607 at 610; *Re Scott and Alvarez's Contract*, *Scott v Alvarez* [1895] 2 Ch 603, CA. See also SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARAS 813-814. As to the measure of damages see PARAS 254-261 post; and as to damages generally see DAMAGES.

4 *Adderley v Dixon* (1824) 1 Sim & St 607; *Regent's Canal Co v Ware* (1857) 23 Beav 575; *Cogent v Gibson* (1864) 33 Beav 557. As to mutuality see *Price v Strange* [1978] Ch 337, [1977] 3 All ER 371, CA (relevant date for considering defence of want of mutuality is date of hearing, not date of contract); and SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 809.

5 *Johnson v Clarke* [1928] Ch 847; *Smith v Colbourne* [1914] 2 Ch 533 at 544-545, CA; and see SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 878. A vendor who claims specific performance according to a wrong interpretation of the contract does not forfeit his right to specific performance on the right interpretation: *Berners v Fleming* [1925] Ch 264, CA.

6 *Wilson v Thomas* [1958] 1 All ER 871, [1958] 1 WLR 422, where a deed of family arrangement provided that the words 'Allan Hewit' in a will should be read as 'Frederick Allan Wilson and Henry Hewitt Wilson' but it was not stated that there was no such person as Allan Hewit. As to defences to claims for specific performance see SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 840 et seq; and as to the duty of the court to declare the meaning of a will see WILLS vol 50 (2005 Reissue) PARA 479.

7 *Craddock Bros v Hunt* [1923] 2 Ch 136, CA; *United States of America v Motor Trucks Ltd* [1924] AC 196, PC. See also *Forgione v Lewis* [1920] 2 Ch 326; and MISTAKE vol 77 (2010) PARA 57 et seq; SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 876.

8 *Hasham v Zenab* [1960] AC 316, [1960] 2 WLR 374, PC, where the vendor tore up the contract within a few minutes of signing it. See also *Marks v Lilley* [1959] 2 All ER 647, [1959] 1 WLR 749; *Oakacre Ltd v Claire Cleaners (Holdings) Ltd* [1982] Ch 197, [1981] 3 All ER 667. As to the completion of the contract see PARAS 262-325 post; and as to the date of completion see PARAS 120, 185 post.

9 *Marks v Lilley* [1959] 2 All ER 647, [1959] 1 WLR 749. See also *Woods v Mackenzie Hill Ltd* [1975] 2 All ER 170, [1975] 1 WLR 613. As to notice to complete see PARA 121 ante.

10 *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL, overruling *Capital and Suburban Properties Ltd v Swycher* [1976] Ch 319, [1976] 1 All ER 881, CA, and approving *Biggin v Minton* [1977] 2 All ER 647, [1977] 1 WLR 701. As to remedies after the decree of specific performance see PARA 253 post.

11 *Johnston v Boyes* (1898) 14 TLR 475. See also *Von Hatzfeldt-Wildenburg v Alexander* [1912] 1 Ch 284 at 289 per Parker J; and cf *Daulia Ltd v Four Millbank Nominees Ltd* [1978] Ch 231, [1978] 2 All ER 557, CA.

12 See *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL.

13 *Oakacre Ltd v Claire Cleaners (Holdings) Ltd* [1982] Ch 197, [1981] 3 All ER 667; *Pinekerry Ltd v Needs (Kenneth) (Contractors) Ltd* (1992) 64 P & CR 245, [1992] NPC 15, CA.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/ (v) Specific Performance/248. When specific performance will be refused.

## 248. When specific performance will be refused.

The claimant is not entitled to the remedy of specific performance if there has been conduct on his part, such as misrepresentation, disentitling him to the relief in equity, and the remedy may be refused if it would impose great hardship on an innocent vendor, where, for instance, he has entered into the contract under mistake, although the other party has not contributed to it<sup>1</sup>. Delay in itself is not a bar to the award of specific performance; the question is whether, in all the circumstances it would be unjust to the defendant to grant the decree<sup>2</sup>. Where by notice or otherwise time is of the essence of the contract, a party who is unable or unwilling to complete on the completion date is not entitled to specific performance<sup>3</sup>.

Specific performance will be refused to a vendor who has made title strictly in accordance with the contract but who has failed to disclose a known defect in the title<sup>4</sup>. It will not be awarded to a purchaser where the property is subject to a spouse's matrimonial home rights<sup>5</sup>, since the effect of the decree would be to compel the vendor to embark on speculative litigation to terminate those rights<sup>6</sup>.

Similarly, specific performance is not available to a purchaser when the vendor is in truth a joint tenant but has purported to sell as sole legal and beneficial owner, as specific performance cannot be ordered against the other joint tenant, and the effect of the decree would therefore be the transfer of the vendor's beneficial half share, which is something quite different from the interest he had contracted to sell<sup>7</sup>.

1 See *Hexter v Pearce* [1900] 1 Ch 341 at 346 per Farwell J; *Patel v Ali* [1984] Ch 283, [1984] 1 All ER 978. See generally *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1996] Ch 286 at 304-305, [1996] 3 All ER 934 at 949, CA, per Millett LJ (dissenting); on appeal [1998] AC 1 at 18, [1997] 3 All ER 297 at 307-308, HL, per Lord Hoffmann. The remedy will be refused where in the circumstances there is no contract: *Hammond v Chubb* (1915) 138 LT Jo 360. Unless the vendor has expressly agreed to make out a good title, he can, in an action for specific performance, show that the purchaser bought with notice that a good title could not be made (*Ellis v Rogers* (1885) 29 ChD 661, CA), but he can only produce evidence of this at the trial of the action; if not produced then, it cannot be used on the inquiry into title (*McGrory v Alderdale Estate Co Ltd* [1918] AC 503, HL). See also 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 241. As to the vendor's obligation to show and prove a good title see PARA 137 ante. As to defences against specific performance see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 785-786; MISTAKE vol 77 (2010) PARA 51; SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 840 et seq. Where after a vendor has begun proceedings for specific performance the contract is completed, the vendor can recover the costs of the specific performance proceedings: *Marks v Lilley* [1959] 2 All ER 647, [1959] 1 WLR 749.

2 *Lazard Bros & Co Ltd v Fairfield Properties Co (Mayfair) Ltd* (1977) 121 Sol Jo 793, where three years had elapsed since the contract, but both parties had approached the transaction in a leisurely way; specific performance was nevertheless granted, because it would cause no injustice to the defendants, and to refuse the decree would be merely to punish the claimants. See also *Williams v Greatrex* [1956] 3 All ER 705, [1957] 1 WLR 31, CA; *Du Sautoy v Symes* [1967] Ch 1146, [1967] 1 All ER 25; cf *Glasbrook v Richardson* (1874) 23 WR 51 (decree refused after delay of three calendar months and 13 days on sale of leasehold colliery). As to the effect of delay in enforcing a decree of specific performance see *Easton v Brown* [1981] 3 All ER 278. As to the effect of possession by the purchaser see *Sharp v Milligan* (1856) 22 Beav 606; and SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 904. As to delay in completion see PARA 121 ante.

3 *Finkelkraut v Monohan* [1949] 2 All ER 234, [1949] WN 298; *Maktoum v South Lodge Flats Ltd* (1980) Times, 22 April. As to the date of completion see PARAS 120, 185 ante; and as to completion of the contract see PARAS 262-325 post.

4 *Faruqi v English Real Estates Ltd* [1979] 1 WLR 963, 38 P & CR 318. As to the formation of the contract see PARAS 23-40 ante.

5 See under the Family Law Act 1996 Pt IV (ss 30-63) (as amended): see LAND CHARGES vol 26 (2004 Reissue) PARA 638.

6 See *Wroth v Tyler* [1974] Ch 30, [1973] 1 All ER 897 (where the purchaser could not obtain specific performance with compensation); and PARA 252 post.

7 *Watts v Spence* [1976] Ch 165, [1975] 2 All ER 528. See also *Cedar Holdings Ltd v Green* [1981] Ch 129, [1979] 3 All ER 117, CA, disapproved in *Williams and Glyn's Bank Ltd v Boland* [1981] AC 487 at 507, [1980] 2 All ER 408 at 415, HL, per Lord Wilberforce. The decision in *Cedar Holdings Ltd v Green* supra was in part based on the equitable doctrine of conversion, which has been abolished by the Trusts of Land and Appointment of Trustees Act 1996 s 3: see REAL PROPERTY vol 39(2) (Reissue) PARA 77. See also *Basma v Weekes* [1950] AC 441, [1950] 2 All ER 146, PC; *Warmington v Miller* [1973] QB 877, [1973] 2 All ER 372, CA, where specific performance of an agreement for an underlease was refused where it would cause a breach of the head lease. As to hardship as a defence to an action for specific performance see SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 869 et seq. In *Amalgamated Investment and Property Co Ltd v John Walker & Sons Ltd* [1976] 3 All ER 509, [1977] 1 WLR 164, CA, the vendor obtained specific performance of a contract to sell a building at a price of £1,700,000, although after contract the building was listed as of historic interest and was then worth only £200,000. It was held inter alia that the contract was not frustrated. Cf *Capital Quality Homes Ltd v Colwyn Construction Ltd* (1975) 9 OR (2d) 617, 61 DLR (3d) 385 Ont CA, and the cases there cited, distinguished in *Victoria Wood Development Corp Inc v Ondrey* (1978) 22 OR (2d) 1, 92 DLR (3d) 229, Ont CA; and see *Witwicki v Midgley* [1979] 5 WWR 242, 101 DLR (3d) 430, Man CA. Cf also *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, [1981] 1 All ER 161, HL (frustration of lease).

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/ (v) Specific Performance/249. Effect of order for specific performance.

#### 249. Effect of order for specific performance.

After an order for specific performance the contract continues in existence<sup>1</sup>, but the court controls the manner in which the contract will be performed. A contractual provision for service of a notice to complete, even if on its true construction designed to apply after a full decree of specific performance, may not be invoked unless the court so orders in working out the decree<sup>2</sup>.

1 As to the formation of the contract see PARAS 23-40 ante; and as to specific performance generally see SPECIFIC PERFORMANCE.

2 *Sudagar Singh v Nazeer* [1979] Ch 474, [1978] 3 All ER 817. As to notice to complete see PARA 121 ante; and as to the completion of the contract see PARAS 262-325 post.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/ (v) Specific Performance/250. Effect of misdescription in open contract.

### **250. Effect of misdescription in open contract.**

Where there is a material defect in the quantity or quality of the property which the vendor has contracted to transfer, and there is no condition giving or excluding compensation<sup>1</sup>, the vendor cannot enforce the contract and compel the purchaser to accept compensation for the deficiency<sup>2</sup>. Where, however, the error in description or the defect is trivial and innocently<sup>3</sup> made, the purchaser may be forced to take the property with compensation<sup>4</sup>. It seems that a vendor cannot enforce specific performance with compensation in his own favour<sup>5</sup>.

1 As to the formation of the contract see PARAS 23-40 ante; and as to conditions giving or excluding compensation see PARA 110 et seq ante. Where there is no provision for compensation, this cannot be obtained after transfer: see PARA 113 note 1 ante. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

2 *Drewe v Hanson* (1802) 6 Ves 675 at 679; *Halsey v Grant* (1806) 13 Ves 73 at 77, 79; *Binks v Lord Rokeby* (1818) 2 Swan 222 at 225; *Cox v Conventon* (1862) 31 Beav 378; *Re Arnold, Arnold v Arnold* (1880) 14 ChD 270 at 279, CA; *Rudd v Lascelles* [1900] 1 Ch 815 at 819; *Watson v Burton* [1956] 3 All ER 929, [1957] 1 WLR 19. Even where there is a condition for compensation (see PARA 111 ante), the court does not compel the purchaser to take property substantially different from that which he contracts to buy: *Flight v Booth* (1834) 1 Bing NC 370 at 377; *Re Fawcett and Holmes' Contract* (1889) 42 ChD 150, CA. Where there is a clause excluding compensation (see PARA 115 ante), the case is a stronger one in favour of the purchaser: *Jacobs v Revell* [1900] 2 Ch 858 at 864; *Re Puckett and Smith's Contract* [1902] 2 Ch 258, CA.

3 It is otherwise where the misdescription is dishonest (*Viscount Clermont v Tasburgh* (1819) 1 Jac & W 112), notwithstanding that there is a condition allowing compensation (*Re Terry and White's Contract* (1886) 32 ChD 14 at 29, CA. See also *Dimmock v Hallett* (1866) 2 Ch App 21 at 28, 31.

4 See *Howland v Norris* (1784) 1 Cox Eq Cas 59 (where an estate was sold with unlimited right of common, although in fact the right only extended to sheep); *Calcraft v Roebuck* (1790) 1 Ves 221 (where the land was described as freehold although a small part was held at will); *Cuthbert v Baker* (1790) Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 313; *Esdaille v Stephenson* (1822) 1 Sim & St 122; *Prendergast v Eyre* (1828) 2 Hog 78 at 81, 94 (where there were undisclosed quitrents or rentcharges of trifling amounts); *King v Wilson* (1843) 6 Beav 124 (error in measurement); *Powell v Elliot* (1875) 10 Ch App 424; and cf *Shepherd v Croft* [1911] 1 Ch 521 (watercourse under property where vendor waived a condition excluding compensation). See also PARA 52 ante; and SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 948. A purchaser who has precluded himself from repudiating the contract may nevertheless be entitled to compensation: *Hughes v Jones* (1861) 3 De GF & J 307 at 316.

5 *Manser v Back* (1848) 6 Hare 443 at 447; and see 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 725.

## **UPDATE**

### **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/ (v) Specific Performance/251. Purchaser's right to specific performance with compensation.



## 251. Purchaser's right to specific performance with compensation.

Where the vendor has either expressly, or impliedly by his conduct, represented that he can transfer a certain property and is entitled to a certain interest in it<sup>1</sup>, and it appears that there is a deficiency either in the quantity or quality of the property<sup>2</sup> or in his interest or title<sup>3</sup>, and that the deficiency is capable of pecuniary assessment<sup>4</sup>, the purchaser can compel the vendor to transfer what he has got and submit to a reduction of the purchase money<sup>5</sup>. It is immaterial that the representation is honestly believed in by the vendor or his agent, provided that it is erroneous and the purchaser relies on it<sup>6</sup>. The misdescription must be contained in the contract. The purchaser cannot obtain compensation for a misrepresentation made collaterally to the contract<sup>7</sup>.

1 See *Price v Griffith* (1851) 1 De GM & G 80; *Rudd v Lascelles* [1900] 1 Ch 815 at 819. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

2 *Hill v Buckley* (1811) 17 Ves 394 (where the area which the vendor was able to sell was less than the amount stated in the contract); *McKenzie v Hesketh* (1877) 7 ChD 675; *Connor v Potts* [1897] 1 IR 534; *Topfell Ltd v Galley Properties Ltd* [1979] 2 All ER 388, [1979] 1 WLR 446 (where the vendor was unable to give vacant possession of part of the premises).

3 Eg where a vendor who purports to sell the fee simple has no title to part of the land (*Western v Russell* (1814) 3 Ves & B 187), or (formerly) had title only to an undivided moiety (*Mortlock v Buller* (1804) 10 Ves 292 at 315-316; *Hooper v Smart, Bailey v Piper* (1874) LR 18 Eq 683; *Horrocks v Rigby* (1878) 9 ChD 180; *Burrow v Scammell* (1881) 19 ChD 175), or is entitled only as tenant for life (*Cleaton v Gower* (1674) Cas temp Finch 164), or pur autre vie (*Barnes v Wood* (1869) LR 8 Eq 424), or in remainder (*Lord Bolingbroke's Case* (circa 1787) 1 Sch & Lef 19n; *Nelthorpe v Holgate* (1844) 1 Coll 203; *Barker v Cox* (1876) 4 ChD 464) (although these interests would now be equitable only; see REAL PROPERTY vol 39(2) (Reissue) PARA 46). The court also assesses the want of a right to renewal of a lease (*Painter v Newby* (1853) 11 Hare 26), a deficiency in the length of a term (*Leslie v Crommelin* (1867) IR 2 Eq 134; *Dale v Lister* (circa 1800), cited in 16 Ves at 7) or in the parcels agreed to be leased (*McKenzie v Hesketh* (1877) 7 ChD 675), the amount of compensation payable for outstanding leases (*Besant v Richards* (1830) Taml 509; cf *Linehan v Cotter* (1844) 7 I Eq R 176); or (formerly) the possibility of a wife becoming entitled to dower (*Wilson v Williams* (1857) 3 Jur NS 810). As to specific performance generally see SPECIFIC PERFORMANCE.

4 It is otherwise where compensation is impossible or extremely difficult of assessment, as in the case of partial interests (*Thomas v Dering* (1837) 1 Keen 729 at 746) or of restrictive covenants (*Cato v Thompson* (1882) 9 QBD 616 at 618, CA; *Rudd v Lascelles* [1900] 1 Ch 815, criticised by Harpum 'Specific Performance with Compensation as a Purchaser's Remedy: A Study in Contract and Equity' [1981] CLJ 47 at 59-67). The court cannot, it seems, as a rule assess compensation for the existence of sporting rights (*Earl of Durham v Sir Francis Legard* (1865) 34 Beav 611; in *Burnell v Brown* (1820) 1 Jac & W 168, the purchaser had waived his objection to the title on this ground), or (formerly) for the difference of tenure between copyhold and freehold property (*Ayles v Cox* (1852) 16 Beav 23, where there was a condition for compensation). However, in *Barnes v Wood* (1869) LR 8 Eq 424, James V-C considered that the court must assess compensation in the best way it can: see PARA 112 ante.

5 *Mortlock v Buller* (1804) 10 Ves 292 at 315; *Milligan v Cooke* (1808) 16 Ves 1; *Powell v Elliot* (1875) 10 Ch App 424 (explained in *Gilchester Properties Ltd v Gomm* [1948] 1 All ER 493 at 497-498, [1948] WN 71 at 72 per Romer J).

6 *Hill v Buckley* (1811) 17 Ves 394; *Hooper v Smart, Bailey v Piper* (1874) LR 18 Eq 683; *Burrow v Scammell* (1881) 19 ChD 175; *Connor v Potts* [1897] 1 IR 534. See also *Castle v Wilkinson* (1870) 5 Ch App 534; and PARA 252 note 5 post.

7 *Rutherford v Acton-Adams* [1915] AC 866, PC; *Gilchester Properties Ltd v Gomm* [1948] 1 All ER 493, [1948] WN 71. As to the remedies available for misrepresentation see PARA 51 ante; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 781 et seq. Where the misrepresentation is collateral, the purchaser's remedy is rescission (or damages in lieu of it), and damages for deceit, negligence or breach of fiduciary duty, or for breach of a collateral contract, if there has been such a contract: see *Rutherford v Acton-Adams* supra at 870. As to an action for damages see 254-261 post; and as to damages generally see DAMAGES.

## UPDATE

## 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/ (v) Specific Performance/252. When specific performance with compensation will not be granted.

### 252. When specific performance with compensation will not be granted.

Specific performance with compensation is not decreed at the instance of the purchaser (1) where there is a substantial difference between the property agreed to be sold and that which the vendor can transfer<sup>1</sup> and partial performance would inflict real hardship on the vendor<sup>2</sup>; or (2) where it would be unjust to third persons<sup>3</sup>; or (3) where the purchaser was aware of the defect or misrepresentation when he entered into the contract<sup>4</sup>, or did not rely on the vendor's representation<sup>5</sup>.

1 *Earl of Durham v Sir Francis Legard* (1865) 34 Beav 611, where the vendor had 11,814 acres and contracted to sell 21,750. Cf *Connor v Potts* [1897] 1 IR 534. See also *Castle v Wilkinson* (1870) 5 Ch App 534; *Rudd v Lascelles* [1900] 1 Ch 815 (criticised by Harpum 'Specific Performance with Compensation as a Purchaser's Remedy: A Study in Contract and Equity' [1981] CLJ 47 at 59-66); *Watson v Burton* [1956] 3 All ER 929, [1957] 1 WLR 19, where the area was stated as 3,920 square yards; in fact it was only 2,360; *Watts v Spence* [1976] Ch 165, [1975] 2 All ER 528; and PARA 52 ante. As to specific performance generally see SPECIFIC PERFORMANCE.

As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

2 See *Price v Griffith* (1851) 1 De GM & G 80 at 86; *Lumley v Ravenscroft* [1895] 1 QB 683, CA; *Hexter v Pearce* [1900] 1 Ch 341 at 345; *Wroth v Tyler* [1974] Ch 30, [1973] 1 All ER 897, where specific performance subject to the spouse's statutory rights of occupation (now matrimonial home rights): see now the Family Law Act 1996 Pt IV (ss 30-63) (as amended); and LAND CHARGES vol 26 (2004 Reissue) PARA 638) might have had the effect of splitting the family.

3 *Thomas v Dering* (1837) 1 Keen 729 at 747; *Naylor v Goodall* (1877) 47 LJ Ch 53; *Willmott v Barber* (1880) 15 ChD 96 (on appeal (1881) 17 ChD 772, CA); *Basma v Weekes* [1950] AC 441, sub nom *Abdul Karim Basma v Weekes* [1950] 2 All ER 146, PC; *Cedar Holdings Ltd v Green* [1981] Ch 129, [1979] 3 All ER 117, CA (disapproved in *Williams and Glyn's Bank Ltd v Boland* [1981] AC 487 at 507, [1980] 2 All ER 408 at 415, HL, per Lord Wilberforce (see PARA 248 note 7 ante)); *Thames Guaranty Ltd v Campbell* [1985] QB 210, [1984] 2 All ER 585, CA; cf *Ahmed v Kendrick and Ahmed* (1987) 56 P & CR 120, [1988] 2 FLR 22, CA.

4 *Hopcraft v Hopcraft* (1897) 76 LT 341. Compensation is not payable in respect of patent defects: see *Cobbett v Locke-King* (1900) 16 TLR 379; *Oldfield (or Bowles) v Round* (1800) 5 Ves 508; and PARA 45 ante. The fact that the purchaser is acquainted with the property does not, however, affect him with notice of easements of water: *Shackleton v Sutcliffe* (1847) 1 De G & Sm 609.

5 *Rudd v Lascelles* [1900] 1 Ch 815 at 818. See also *Thomas v Dering* (1837) 1 Keen 729 at 747; and *Lord Bolingbroke's Case* (circa 1787) 1 Sch & Lef 19n, where the purchaser who, it would seem, knew of the vendor's limited interest but had, with the vendor's consent, expended money on the property was awarded compensation.

## UPDATE

## 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/ (v) Specific Performance/253. Remedies after decree of specific performance.

### **253. Remedies after decree of specific performance.**

Where the vendor fails to comply with the decree of specific performance<sup>1</sup>, the most powerful remedy available to the purchaser is to apply to the court for an order vesting the land in him, or appointing some person to transfer it to him<sup>2</sup>. Where the party in default is the purchaser, the vendor may apply for an order rescinding the contract and forfeiting the deposit<sup>3</sup>. For any further loss the vendor may recover damages for breach of contract or damages in lieu of specific performance<sup>4</sup>.

1 As to specific performance generally see SPECIFIC PERFORMANCE.

2 See the Trustee Act 1925 ss 48-50; para 266 post; and TRUSTS vol 48 (2007 Reissue) PARAS 632, 869 et seq. Alternatively, the purchaser could apply for an order rescinding the contract and ordering the return of the deposit, and seek compensation for any further loss by way of damages for breach of contract or damages in lieu of specific performance: see the text and note 4 infra. As to recovery of the deposit by the purchaser see PARAS 245-246 ante; as to the measure of damages see PARAS 254-261 post; and as to damages generally see DAMAGES.

As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

3 *Foligno v Martin* (1853) 16 Beav 586; *Simpson v Terry* (1865) 34 Beav 423; *Clark v Wallis* (1866) 35 Beav 460; *Henty v Schröder* (1879) 12 ChD 666. As to forfeiture of the deposit to the vendor see PARAS 234-238 ante; and as to rescission see PARAS 232-233 ante.

4 *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL, overruling a line of cases: see PARA 232 note 7 ante. As to when damages are awarded in lieu of specific performance see SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 960.

## **UPDATE**

### **137-261 Rights and Duties Prior to Completion**

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/ (vi) Damages/254. Action for damages.

## **(vi) Damages**

### **254. Action for damages.**

Either the vendor<sup>1</sup> or the purchaser<sup>2</sup> can maintain an action for damages for breach of the contract by the other party, but for this purpose there must be a contract enforceable at law<sup>3</sup>. The claim may be made by a party who has elected to rescind the contract following a repudiatory breach by the other party<sup>4</sup>. On the other hand, a party who elects to affirm the contract may claim in the alternative for specific performance or damages<sup>5</sup>.

1 *Laird v Pim* (1841) 7 M & W 474.

2 *Williams v Glenton* (1866) 1 Ch App 200 at 209.

3 As to a claim for damages for delay in completion see *Raineri v Miles (Wiejski, third party)* [1981] AC 1050, [1980] 2 All ER 145, HL; and PARA 120 ante. As to damages for breach of contract see DAMAGES vol 12(1) (Reissue) PARAS 941 et seq, 1059.

4 *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL.

5 *Cornwall v Henson* [1900] 2 Ch 298, CA; *Hipgrave v Case* (1885) 28 ChD 356, CA; *Ellis v Rogers* (1885) 29 ChD 661 at 663, CA; *Nicholson v Brown* [1897] WN 52. Formerly only one of these remedies could be obtained (*Orme v Broughton* (1834) 10 Bing 533 at 539; *Sainter v Ferguson* (1849) 1 Mac & G 286 at 290); but, on the claim for specific performance, the court can now give damages either in lieu of, or in addition to, specific performance (see DAMAGES vol 12(1) (Reissue) PARA 1127; EQUITY vol 16(2) (Reissue) PARA 410). In some instances, a claim for specific performance and damages may be cumulative, not alternative; for example specific performance with damages for delay: see DAMAGES vol 12(1) (Reissue) PARA 1129; SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 959. Such a claim may be made before the date for completion and, if the land is transferred without a court order so that the specific performance action lapses, the court may still award damages: see *Oakacre Ltd v Claire Cleaners (Holdings) Ltd* [1982] Ch 197, [1981] 3 All ER 667; and *Pinekerry Ltd v Needs (Kenneth) (Contractors) Ltd* (1992) 64 P & CR 245, [1992] NPC 15, CA. As to specific performance see PARAS 247-253 ante; and SPECIFIC PERFORMANCE. As to the date for completion see PARAS 120, 185 ante; and as to completion see PARAS 262-325 post. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/ (vi) Damages/255. Vendor's action for damages.

### 255. Vendor's action for damages.

Damages for breach of contract are in the nature of compensation, not of punishment<sup>1</sup>, and the measure of damages is the amount of injury sustained by reason of the breach of contract<sup>2</sup>. This principle applies in the case of a sale of land where the contract is broken by the purchaser<sup>3</sup> even if he is later found to be suffering from mental disorder, provided that the vendor did not know and had no reason to suppose that the purchaser was so suffering<sup>4</sup>. Where no date is fixed for completion the amount of the damages is generally ascertained when the purchaser finally repudiates the contract<sup>5</sup>. Hence the vendor cannot recover the purchase money, notwithstanding that the purchaser has been let into possession<sup>6</sup>, unless the transfer

has been executed<sup>7</sup>. However, on a resale at a lower price, the vendor can recover the difference in price and the expenses of the resale<sup>8</sup>.

1 *Addis v Gramophone Co Ltd* [1909] AC 488 at 494-495, HL. As to damages for breach of contract see DAMAGES vol 12(1) (Reissue) PARAS 941 et seq, 1059.

2 See *Robinson v Harman* (1848) 1 Exch 850 at 855 per Parke B, who held that a party who has sustained loss by reason of a breach of contract is, with respect to damages, to be placed in the same position as he would have been if the contract had been performed; *Wall v City of London Real Property Co Ltd* (1874) LR 9 QB 249 at 253.

3 *Laird v Pim* (1841) 7 M & W 474.

4 *York Glass Co Ltd v Jubb* (1925) 134 LT 36, CA. As to the subsequent mental disorder of either party see PARA 218 ante; and as to sales and purchases on behalf of mentally disordered persons generally see MENTAL HEALTH vol 30(2) (Reissue) PARA 671 et seq.

5 *York Glass Co Ltd v Jubb* (1925) 134 LT 36 at 37, CA. As to the date of completion of the contract see PARAS 120, 185 ante; as to completion of the contract see PARAS 262-325 post; and as to the date when damages are assessed see PARA 260 post.

6 *Laird v Pim* (1841) 7 M & W 474 at 478; *Moor v Roberts* (1858) 3 CBNS 830 at 844. As to the recovery of interest on the purchase money see PARAS 122, 194-197 ante; and as to possession prior to completion of the contract see PARA 186 ante.

7 See *Laird v Pim* (1841) 7 M & W 474; *East London Union v Metropolitan Rly Co* (1869) LR 4 Exch 309; *Leader v Tod-Heatly* [1891] WN 38. It would appear that, notwithstanding repudiation of the contract by the purchaser, the vendor could unilaterally execute the conveyance and then recover the purchase money: see *White and Carter (Councils) Ltd v McGregor* [1962] AC 413, [1961] 3 All ER 1178, HL; and CONTRACT vol 9(1) (Reissue) PARAS 1004, 1006. Unilateral execution was successfully achieved in *Tudor v Hamid* [1988] 1 EGLR 251, [1987] NLJ Rep 79, CA. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

8 *Noble v Edwardes, Edwardes v Noble* (1877) 5 ChD 378, CA; *Barrow v Arnaud* (1846) 8 QB 604 at 609-610, Ex Ch. The measure of damages is the difference between the contract price and the value of the property. This is determined by the price obtained or obtainable on a resale within a reasonable time of the breach, and not by the price to be obtained by nursing the property: see *Keck v Faber, Jellett and Keeble* (1915) 60 Sol Jo 253; and DAMAGES vol 12(1) (Reissue) PARA 1059. Any deposit must be taken into account: see *Ockenden v Henly* (1858) EB & E 485; and PARA 233 ante.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/ (vi) Damages/256. Purchaser's action.

### 256. Purchaser's action.

In relation, to contracts made on or before 27 September 1989<sup>1</sup>, at common law the damages which a purchaser of realty<sup>2</sup> can recover for a breach of contract<sup>3</sup> by the vendor are, in general, limited to the expenses which he has incurred<sup>4</sup>. This rule forms an exception to the ordinary law

of contract that an injured person is entitled to be placed in the same position as if the contract had been performed<sup>5</sup>. Thus if a vendor who has not expressly undertaken to deduce a good title<sup>6</sup> is unable, acting in good faith<sup>7</sup>, and without committing a breach of trust<sup>8</sup>, to make a title, the purchaser, in an action for breach of contract, can recover only the expenses which he has incurred<sup>9</sup>, but not damages for the loss of his bargain<sup>10</sup>. This is an exceptional rule which applies only if the vendor, through no default of his own, is unable to carry out his contractual obligation to make a good title. In order to obtain the benefit of the rule, the vendor must prove that he has used his best endeavours to make a good title, including a proper attempt to obtain any necessary consent of a third person<sup>11</sup>. If the vendor fails to discharge this burden of proof, the purchaser is entitled to substantial damages<sup>12</sup>, which will be assessed according to the normal rule applicable to damages in contract<sup>13</sup>. In such a case the purchaser is entitled to damages for such consequences of the vendor's breach of contract as follow in the usual course from the breach or may reasonably be supposed to have been in the contemplation of both parties at the time of contract<sup>14</sup>. Where there is merely a delay in completion, the purchaser is entitled to recover damages for the delay<sup>15</sup>, and where there is a failure to complete, he can recover damages for loss of his bargain<sup>16</sup>. Damages for loss of bargain can be obtained if on the sale of leaseholds the vendor is in default in failing to obtain any necessary consent of the lessor<sup>17</sup>. A spouse's matrimonial home right<sup>18</sup> is not a defect of title within the exceptional rule<sup>19</sup>. It seems that the purchaser may be granted a lien on the land for the damages if he formally claims it<sup>20</sup>.

1 In relation to contracts made after 27 September 1989, damages are no longer limited under the rule in *Bain v Fothergill* (1874) LR 7 HL 158: see the Law of Property (Miscellaneous Provisions) Act 1989 s 3; and DAMAGES vol 12(1) (Reissue) PARA 1059.

2 This includes incorporeal hereditaments (*Pounsett v Fuller* (1856) 17 CB 660), and contracts to grant leases of land (*Pease v Courtney* [1904] 2 Ch 503 at 511-512). See also *Robinson v Harman* (1848) 1 Exch 850; *Hanslip v Padwick* (1850) 5 Exch 615; *Gas Light and Coke Co v Towse* (1887) 35 ChD 519 at 543; *Rowe v London School Board* (1887) 36 ChD 619; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 94. As to incorporeal hereditaments see REAL PROPERTY vol 39(2) (Reissue) PARA 81.

3 The rule applies only to a broken contract, not to a breach of covenant in a conveyance: *Lock v Furze* (1866) LR 1 CP 441. Upon the death of the purchaser, the right to sue for damages passes to his personal representatives: *Orme v Broughton* (1834) 10 Bing 533; Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 238; and see EXECUTORS AND ADMINISTRATORS.

4 See *Grant v Dawkins* [1973] 3 All ER 897, [1973] 1 WLR 1406; and DAMAGES vol 12(1) (Reissue) PARA 1059. See also note 1 supra.

5 See DAMAGES vol 12(1) (Reissue) PARAS 1015 et seq, 1059. This exceptional rule is based upon the uncertainty of making out a good title owing to the complexity of the English law of real property: see *Day v Singleton* [1899] 2 Ch 320 at 329, CA; *Malhotra v Choudhury* [1980] Ch 52, [1979] 1 All ER 186, CA. The rule does not apply to damages for misrepresentation: see PARA 259 post; and DAMAGES vol 12(1) (Reissue) PARAS 1109-1110.

6 See PARA 137 ante; and Farrer's Conditions of Sale (2nd Edn, 1909) 9-10. As to the vendor's obligation to show and prove a good title see PARA 137 ante.

7 *Jones v Gardiner* [1902] 1 Ch 191 at 195 per Byrne J; *Walker v Moore* (1829) 10 B & C 416 at 421. As to the requirements of good faith see PARAS 41, 48 ante.

8 *Wall v City of London Real Property Co Ltd* (1874) LR 9 QB 249.

9 *Flureau v Thornhill* (1776) 2 Wm Bl 1078; *Bain v Fothergill* (1874) LR 7 HL 158 at 207, 210; and see note 1 supra. See also *Sikes v Wild* (1861) 1 B & S 587 (affd (1863) 4 B & S 421, Ex Ch); *Hyam v Terry* (1881) 25 Sol Jo 371, CA; *Rowe v London School Board* (1887) 36 ChD 619; *Re Daniel, Daniel v Vassall* [1917] 2 Ch 405 at 408; *Braybrooks v Whaley* [1919] 1 KB 435 at 438, DC; *Keen v Mear* [1920] 2 Ch 574 at 581; *Barnes v Cadogan Developments Ltd* [1930] 1 Ch 479 at 488; *JW Cafés Ltd v Brownlow Trust Ltd* [1950] 1 All ER 894, [1950] WN 191 (where a contract to grant a lease in a particular form was prevented by covenants as to user); and *Seven Seas Properties Ltd v Al-Essa* [1989] 1 All ER 164, [1988] 1 WLR 1272 (purchaser given no opportunity to use best endeavours to obtain good title). As to what expenses come within this description see PARA 257 post.

10 *Bain v Fothergill* (1874) LR 7 HL 158; *Williams v Glenton* (1866) 1 Ch App 200 at 209; *Morgan v Russell & Sons* [1909] 1 KB 357, DC. See note 1 supra.

11 *Malhotra v Choudhury* [1980] Ch 52, [1979] 1 All ER 186, CA, where the vendor and his wife were joint tenants, and there was no evidence that the vendor had tried to persuade his wife to consent. Substantial damages were awarded.

12 *Engell v Fitch* (1869) LR 4 QB 659, Ex Ch (sale by mortgagees with vacant possession who deliberately omitted to eject mortgagor); *Godwin v Francis* (1870) LR 5 CP 295 at 306, 308; *Jaques v Millar* (1877) 6 ChD 153 (overruled on another point by *Marshall v Berridge* (1881) 19 ChD 233, CA); *Royal Bristol Permanent Building Society v Bomash* (1887) 35 ChD 390; *Jones v Gardiner* [1902] 1 Ch 191; *Re Daniel, Daniel v Vassall* [1917] 2 Ch 405 (vendor's inability to complete due to mortgagee's refusal to release the property); *Braybrooks v Whaley* [1919] 1 KB 435, DC (mortgagee's omission to obtain leave of court to sell, where leave required); *Thomas v Kensington* [1942] 2 KB 181, [1942] 2 All ER 263 (vendor unwilling to redeem mortgage: purchaser entitled to damages although he knew of the mortgage at the time of the contract); *Phillips v Lamdin* [1949] 2 KB 33, [1949] 1 All ER 770 (mere delay by the vendor); *Malhotra v Choudhury* [1980] Ch 52, [1979] 1 All ER 186, CA (failure of one joint tenant to obtain consent of the other (his wife)); *Sharneyford Supplies Ltd v Edge* [1987] Ch 305, [1987] 1 All ER 588, CA (failure by vendor to give notice to quit to periodic tenant). See also *AVG Management Science Ltd v Barwell Developments Ltd* [1979] 1 WWR 330, 92 DLR (3d) 289, Can SC (where the vendor, in breach of contract with the purchaser, accepted an offer from a second purchaser); *Strutt v Whitnell* [1975] 2 All ER 510, [1975] 1 WLR 870, CA. As to the recovery of expenses as well as damages see PARA 257 post. See further *Gedye v Duke of Montrose* (1858) 26 Beav 45; *Lehmann v McArthur* (1868) 3 Ch App 496 at 500; *Wesley v Walker* (1878) 26 WR 368. As to the vendor's duty to do all he reasonably can to perfect his title see *Costigan v Hastler* (1804) 2 Sch & Lef 160 at 166; *Day v Singleton* [1899] 2 Ch 320 at 332, CA, per Jeune P; and PARA 137 et seq ante. Where the vendor's abstract, which was negligently but not fraudulently prepared, showed a good title, and the purchaser resold without comparing it with the deeds, he did not obtain damages: *Walker v Moore* (1829) 10 B & C 416 at 423. Where the purchaser has resold at a profit, and the vendor by his own default has rendered himself unable to complete the contract, the damages recoverable by the purchaser will be the amount of the profit which would have been made on such resale: *Goffin v Houlder* (1920) 90 LJ Ch 488, applied in *Wright v Dean* [1948] Ch 686, [1948] 2 All ER 415, to an option to purchase in a lease.

13 As to damages in contract see DAMAGES vol 12(1) (Reissue) PARAS 941 et seq, 1059.

14 See eg *Diamond v Campbell-Jones* [1961] Ch 22 at 31-34, [1960] 1 All ER 583 at 588-590 per Buckley J; *Cottrill v Steyning and Littlehampton Building Society* [1966] 2 All ER 295, [1966] 1 WLR 753; *Seven Seas Properties Ltd v Al-Essa (No 2)* [1993] 3 All ER 577, [1993] 1 WLR 1083; and DAMAGES vol 12(1) (Reissue) PARA 941 et seq. Such damages can include expenditure required by the contract, even though incurred before the contract was formed: see *Lloyd v Stanbury* [1971] 2 All ER 267, [1971] 1 WLR 535; and DAMAGES vol 12(1) (Reissue) PARAS 994, 996, 1059.

15 *Jones v Gardiner* [1902] 1 Ch 191; *Phillips v Lamdin* [1949] 2 KB 33, [1949] 1 All ER 770. Cf *Jaques v Millar* (1877) 6 ChD 153. As to delay in completion see PARA 121 ante; and as to completion of the contract see PARAS 262-325 post.

16 See eg *Braybrooks v Whaley* [1919] 1 KB 435, DC; *Thomas v Kensington* [1942] 2 KB 181, [1942] 2 All ER 263; and PARA 258 post.

17 *Day v Singleton* [1899] 2 Ch 320, CA. As to the time by which consent must be obtained see PARA 240 ante.

18 As to a spouses' matrimonial home right see PARA 248 note 5 ante; and LAND CHARGES; MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 292.

19 *Wroth v Tyler* [1974] Ch 30, [1973] 1 All ER 897.

20 See LIEN vol 68 (2008) PARA 868.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

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Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/ (vi) Damages/257. Purchaser's expenses recoverable by way of damages.

### **257. Purchaser's expenses recoverable by way of damages.**

The expenses which a purchaser, affirming a contract, can recover as damages include the cost of preparing, stamping and executing the contract<sup>1</sup>, investigating the title<sup>2</sup>, searching for incumbrances<sup>3</sup>, examining deeds<sup>4</sup>, and, if the vendor's breach took place after the title had been accepted, of preparing the transfer<sup>5</sup>, together with interest on the deposit from the time completion should have taken place<sup>6</sup>. These conveyancing costs are recoverable whether they have actually been paid to the purchaser's solicitor or not<sup>7</sup>. In addition, the purchaser can recover compensation for any pre-contract expenditure where this is contemplated by the contract or which would reasonably be in the contemplation of the parties as likely to be wasted if the contract is broken<sup>8</sup>.

Subject to this general principle as to wasted expenditure, the purchaser cannot recover money expended in repairs<sup>9</sup> or improvements<sup>10</sup>, or the difference between party and party and common fund costs of an action for specific performance<sup>11</sup>, or any expenses incurred after he is aware of a definite breach of the contract on the vendor's part<sup>12</sup>. However, on a sale under the direction of the court, the purchaser can recover, in addition to his other expenses, all costs incurred by his having bid for and become the purchaser of the property<sup>13</sup>. If the purchaser treats the contract as repudiated, he cannot recover any expense which he incurred only because he was at that time keeping open his option to sue for specific performance; on the contrary, the purchaser's duty is to mitigate his loss<sup>14</sup>, but this duty does not oblige him to accept an offer by the vendor to repurchase the property at the contract price<sup>15</sup>.

1 *Hanslip v Padwick* (1850) 5 Exch 615.

2 *Richards v Barton* (1795) 1 Esp 268; *Hanslip v Padwick* (1850) 5 Exch 615; *Compton v Bagley* [1892] 1 Ch 313. See also *Hall v Betty* (1842) 5 Scott NR 508 at 513; *Re Daniel, Daniel v Vassall* [1917] 2 Ch 405. As to the costs of making and verifying the abstract, producing deeds not in the vendor's possession etc see PARAS 170-173 ante. As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 ante.

3 *Hanslip v Padwick* (1850) 5 Exch 615. As to searching for incumbrances see PARAS 167-169 ante.

4 *Hodges v Earl of Litchfield* (1835) 1 Bing NC 492. As to requisitions on title see PARAS 163-166 ante.

5 Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 362; 2 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 844; 2 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 1021. As to the purchaser's acceptance of the title see PARAS 174-176 ante; and as to the preparation of the transfer see PARAS 129 ante, 262 et seq post. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 post.

6 *De Bernales v Wood* (1812) 3 Camp 258. As to the purchaser's right to recover the deposit with interest see PARAS 245-246 ante. As to the completion of the contract see PARAS 262-325 post; and as to the date for completion see PARAS 120, 185 ante. As to costs generally payable by the purchaser see PARA 323 post.

7 *Hodges v Earl of Litchfield* (1835) 1 Bing NC 492 at 498; *Richardson v Chasen* (1847) 10 QB 756. As to solicitors' costs see LEGAL PROFESSIONS vol 66 (2009) PARA 931 et seq. See also PARA 3 ante.

8 *Lloyd v Stanbury* [1971] 2 All ER 267, [1971] 1 WLR 535; *Anglia Television Ltd v Reed* [1972] 1 QB 60, [1971] 3 All ER 690, CA. This principle seems to cast doubt on a number of cases which had disallowed various items of pre-contract expenditure: see eg *Flureau v Thornhill* (1776) 2 Wm BI 1078 (loss incurred by raising purchase money by sale of stock); *Jarmain v Egelstone* (1831) 5 C & P 172 (preparation of conveyance); *Sherry v Oke* (1835) 3 Dowl 349 at 361 (expenses of raising purchase money by borrowing); *Hodges v Earl of Litchfield*



(1835) 1 Bing NC 492 (costs of negotiation, survey, valuation and preparation of conveyance prior to acceptance of title); and *Hanslip v Padwick* (1850) 5 Exch 615.

9 *Bratt v Ellis* (1805) Sugden's Law of Vendors and Purchasers (14th Edn, 1862) App V, 812.

10 *Worthington v Warrington* (1849) 8 CB 134; *Lloyd v Stanbury* [1971] 2 All ER 267, [1971] 1 WLR 535. Cf expenditure necessary to preserve the property: see *Lloyd v Stanbury* supra at 275 and 547 per Brightman J.

11 *Hodges v Earl of Litchfield* (1835) 1 Bing NC 492; *Cockburn v Edwards* (1881) 18 ChD 449, CA. See also *Malden v Fyson* (1847) 11 QB 292; *Wood v Scarth* (1855) 2 K & J 33 at 44. As to specific performance see PARAS 247-253 ante; and SPECIFIC PERFORMANCE.

12 *Pounsett v Fuller* (1856) 17 CB 660; *Sikes v Wild* (1861) 1 B & S 587 at 590 (affd (1863) 4 B & S 421 at 424, Ex Ch).

13 *Holliwell v Seacombe* [1906] 1 Ch 426.

14 *Lloyd v Stanbury* [1971] 2 All ER 267 at 275, [1971] 1 WLR 535 at 546 per Brightman J. As to the duty to mitigate see generally DAMAGES vol 12(1) (Reissue) PARA 1041 et seq.

15 *Strutt v Whitnell* [1975] 2 All ER 510, [1975] 1 WLR 870, CA.

## UPDATE

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Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/ (vi) Damages/258. Damages for loss of bargain.

### 258. Damages for loss of bargain.

The measure of damages for loss of bargain is normally the difference between the contract price and the market value at the date of repudiation<sup>1</sup>. The mere fact that property is obviously ripe for conversion to a more profitable use is not sufficient to justify imputing to the vendor knowledge that the purchaser intended to convert it to such a use, or to entitle the purchaser to recover as damages the profit which he would have realised by such a conversion<sup>2</sup>. Where the purchaser is by profession a dealer in real estate so that the damages recovered by him are liable to attract income tax as part of the profits or gains of his business, he should be awarded a gross sum equal to the difference between the contract price and the market value and not merely a net sum equivalent to the profit remaining after deduction of income tax<sup>3</sup>.

Where a purchaser recovers substantial damages for loss of his bargain on account of a breach of the contract by the vendor, he is not, it seems, entitled to his expenses as well. If he were so entitled, he would actually benefit by the breach, since, if the contract had been completed, he would have had to pay the expenses himself<sup>4</sup>. This rule has, however, been varied where a house was sold with vacant possession at a time of housing shortage and, although the sale was completed, vacant possession was not given owing to the existence of a tenancy<sup>5</sup>.

<sup>1</sup> *Engell v Fitch* (1869) LR 4 QB 659, Ex Ch; *Godwin v Francis* (1870) LR 5 CP 295 at 306, 308; *Re Daniel, Daniel v Vassall* [1917] 2 Ch 405; *Goffin v Houlder* (1920) 90 LJ Ch 488 (difference between price at which

property was offered to claimant and that at which he had contracted to resell it); *Brading v F McNeill & Co Ltd* [1946] Ch 145, [1946] WN 20; *Wright v Dean* [1948] Ch 686, [1948] 2 All ER 415; *Diamond v Campbell-Jones* [1961] Ch 22, [1956] 1 All ER 583. If there is no difference between the contract price and market value, the purchaser is entitled to his expenses: *Wallington v Townsend* [1939] Ch 588, [1939] 2 All ER 225. As to the date for assessing damages see PARA 260 post; and as to the measure of damages in contract see DAMAGES vol 12(1) (Reissue) PARA 1059.

2 *Diamond v Campbell-Jones* [1961] Ch 22, [1960] 1 All ER 583; *Seven Seas Properties Ltd v Al-Essa (No 2)* [1993] 3 All ER 577, [1993] 1 WLR 1083. Cf *Cottrill v Steyning and Littlehampton Building Society* [1966] 2 All ER 295, [1966] 1 WLR 753, where the vendors knew that the purchasers intended to develop.

3 *Diamond v Campbell-Jones* [1961] Ch 22, [1960] 1 All ER 583, distinguishing *British Transport Commission v Gourley* [1956] AC 185, [1955] 3 All ER 796, HL. As to the income tax liability of dealers in land see INCOME TAXATION vol 23(1) (Reissue) PARA 83 et seq.

4 *Re Daniel, Daniel v Vassall* [1917] 2 Ch 405 at 412; 2 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 1023-1024. See also *Hopkins v Grazebrook* (1826) 6 B & C 31; *Robinson v Harman* (1848) 1 Exch 850; *Day v Singleton* [1899] 2 Ch 320, CA; *Ridley v De Geerts* [1945] 2 All ER 654, 146 Estates Gazette 390, CA; and cf *Engel v Fitch* (1868) LR 3 QB 314 (on appeal (1869) LR 4 QB 659, Ex Ch); *Godwin v Francis* (1870) LR 5 CP 295, where damages for loss of bargain and expenses were both allowed (*Engel v Fitch* supra and *Godwin v Francis* supra are generally thought to be wrongly decided, for the reason given in the text). See also *Wallington v Townsend* [1939] Ch 588, [1939] 2 All ER 225; and note 1 supra. As to costs generally payable by the purchaser see PARA 323 post; and as to completion see PARAS 262-325 post.

5 *Beard v Porter* [1948] 1 KB 321, [1947] 2 All ER 407, CA, where the purchaser was awarded the difference in value between the purchase price and the value of the house subject to the tenancy, and also solicitor's charges and stamp duty incurred in buying another house and the cost of lodgings between the date when vacant possession of the first house should have been given and the date when the purchaser moved into the second house. As to vacant possession see PARA 123 ante; as to the position of the parties after completion see PARAS 326-359 post; and as to solicitors' costs see LEGAL PROFESSIONS vol 66 (2009) PARA 931 et seq.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

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Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/ (vi) Damages/259. Vendor's misrepresentation.

### 259. Vendor's misrepresentation.

Where, at the time of entering into the contract, the vendor knows that he has no title and no means of acquiring one, and the circumstances are such as to make his conduct fraudulent, the purchaser can recover substantial damages in an action of deceit<sup>1</sup>. Equally, substantial damages may be awarded to the purchaser where the vendor makes a misrepresentation as to his title not proved to have been made without negligence<sup>2</sup>.

1 *Bain v Fothergill* (1874) LR 7 HL 158 at 207. In relation to contracts made after 27 September 1989, damages are no longer limited under the rule in *Bain v Fothergill* (1874) LR 7 HL 158: see the Law of Property (Miscellaneous Provisions) Act 1989 s 3; and DAMAGES vol 12(1) (Reissue) PARA 1059. See also *Day v Singleton* [1899] 2 Ch 320 at 329, CA. For this purpose the vendor's conduct must amount to actual fraud: *Derry v Peek* (1889) 14 App Cas 337, HL; and see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 755 et seq. As to

the vendor's obligation to show and prove a good title see PARAS 137-173 ante; and as to the measure of damages in deceit see DAMAGES vol 12(1) (Reissue) PARA 875.

2 See the Misrepresentation Act 1967 s 2(1) (see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 801); *Watts v Spence* [1976] Ch 165, [1975] 2 All ER 528; and *Errington v Martell-Wilson* (1980) 130 NLJ 545. In both these cases the mere fact of contracting to sell was held to amount to an implied representation as to title. Where such a representation is false, substantial damages have always been awarded without regard to the rule limiting damages to expenses (see PARA 257 ante): *Watts v Spence* supra.

## UPDATE

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Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/2. RIGHTS AND DUTIES PRIOR TO COMPLETION/ (6) REMEDIES UNDER AN UNCOMPLETED CONTRACT/ (vi) Damages/260. Date for assessment of damages.

### 260. Date for assessment of damages.

The general principle for the assessment of damages is compensatory, that is, that the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed<sup>1</sup>. Whether damages are claimed by the vendor or purchaser, the normal date for the assessment of damages is the date of the breach of contract<sup>2</sup>. However, if to follow this rule would cause injustice, the court may fix such other date as may be appropriate to provide proper compensation for the innocent party<sup>3</sup>. Where one party has obtained a decree of specific performance which proves impossible to execute, the innocent party may rescind the contract and seek damages, which will be assessed as at the date the contract is finally abandoned, not the date of the original breach<sup>4</sup>. The damages cannot be enhanced by any delay of that party in bringing or prosecuting his claim for damages<sup>5</sup>.

1 See PARA 255 ante; and DAMAGES vol 12(1) (Reissue) PARA 941.

2 *York Glass Co Ltd v Jubb* (1925) 134 LT 36, CA; and see DAMAGES vol 12(1) (Reissue) PARA 950. Date of breach will be the appropriate date where the property depreciates after that date: *Woodford Estates Ltd v Pollack* (1978) 93 DLR (3d) 350. As to the vendor's action for damages see PARA 255 ante; and as to the purchaser's action for damages see PARAS 256-258 ante.

3 See *Johnson v Agnew* [1980] AC 367 at 401, [1979] 1 All ER 883 at 896, HL, per Lord Wilberforce (where it was held that if the innocent party tried to continue the contract, damages should be assessed at the date when the contract was finally lost); and DAMAGES vol 12(1) (Reissue) PARA 951. See also *Ogle v Earl Vane* (1867) LR 2 QB 275 (affd (1868) LR 3 QB 272, Ex Ch) (date when innocent party acting reasonably went into the market); *Hickman v Haynes* (1875) LR 10 CP 598 (reasonable time after defendant's last request to withhold delivery); *Forster v Silvermere Golf and Equestrian Centre Ltd* (1981) 42 P & CR 255; and *Radford v de Froberville* [1978] 1 All ER 33, [1977] 1 WLR 1262 (damages assessed as at date of hearing). See further *Wroth v Tyler* [1974] Ch 30, [1973] 1 All ER 897; *Grant v Dawkins* [1973] 3 All ER 897, [1973] 1 WLR 1406; *Techno Land Improvements Ltd v British Leyland (UK) Ltd* (1979) 252 Estates Gazette 805; *Malhotra v Choudhury* [1980] Ch 52, [1979] 1 All ER 186, CA; *E Johnson & Co (Barbados) Ltd v NSR Ltd* [1997] AC 400, [1996] 3 WLR 583, PC.

4 *Johnson v Agnew* [1980] AC 367, [1979] 1 All ER 883, HL, also holding (contra *Wroth v Tyler* [1974] Ch 30, [1973] 1 All ER 897), that the position is the same in law as in equity (ie where damages in lieu of specific

performance are awarded (see EQUITY vol 16(2) (Reissue) PARA 410; SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 960)); and see *Domb v Isoz* [1980] Ch 548, [1980] 1 All ER 942, CA.

5 *Malhotra v Choudhury* [1980] Ch 52, [1979] 1 All ER 186, CA; *Hickey v Bruhns* [1977] 2 NZLR 71; and see DAMAGES vol 12(1) (Reissue) PARA 1128.

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#### 261. Procedure.

Damages for breach of the contract cannot be recovered on an application by a vendor or purchaser for a summary order<sup>1</sup>, although an order can be made for the return of the deposit with interest and for payment by the vendor of the purchaser's costs of investigating title<sup>2</sup>. Substantial damages can, however, be recovered where an action is brought<sup>3</sup>.

1 le an application under the Law of Property Act 1925 s 49 (as amended): see PARA 220 ante.

2 See PARA 222 ante.

3 See *Laird v Pim* (1841) 7 M & W 474; *Leader v Tod-Heatly* [1891] WN 38. In relation to proceedings commenced after 26 April 1999 the procedure for bringing an action is governed by CPR Pts 7, 8. As to the CPR see PARA 133 note 1 ante. As to the procedure before that date see RSC Ord 5 r 4(1). As to the pleadings to be made in a vendor's action see *Ellis v Rogers* (1885) 29 ChD 661 at 667, CA. See also *Perry v Smith* (1842) Car & M 554; *Johnstone v Milling* (1886) 16 QBD 460, CA. As to what a purchaser must prove see *Howe v Smith* (1884) 27 ChD 89 at 103, CA, per Fry LJ. See also *Poole v Hill* (1840) 6 M & W 835 at 841; *Lovelock v Franklyn* (1846) 8 QB 371. See further CIVIL PROCEDURE.

## UPDATE

### 137-261 Rights and Duties Prior to Completion

The Housing Act 2004 Pt 5 (ss 148-178) makes it compulsory for every residential property on the market to have a home information pack containing information relating to such matters as searches, evidence of title and energy efficiency: see PARA 4A.

#### 261 Procedure

NOTE 3--As to CPR Pt 7 see CIVIL PROCEDURE vol 11 (2009) PARA 116 et seq; as to CPR Pt 8 see CIVIL PROCEDURE vol 11 (2009) PARA 127 et seq.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(1) ASSURING THE PROPERTY AND DISCHARGING INCUMBRANCES/(i) The Transfer and the Duty to Prepare it/262. Preparation of transfer.

### **3. COMPLETION**

#### **(1) ASSURING THE PROPERTY AND DISCHARGING INCUMBRANCES**

##### **(i) The Transfer and the Duty to Prepare it**

###### **262. Preparation of transfer.**

The contract is completed by payment of the purchase money<sup>1</sup> by the purchaser, the execution and delivery at the same time of a transfer<sup>2</sup> by the vendor<sup>3</sup> and the handing over of such deeds as relate wholly to the property transferred<sup>4</sup>. In the absence of agreement to the contrary<sup>5</sup>, the purchaser prepares the draft transfer and submits it to the vendor for approval<sup>6</sup>. The purchaser should not prepare the draft transfer before production of the deeds<sup>7</sup>.

1 There is at the same time payment or allowance of any balance shown on the completion statement (as to which see PARA 2 note 8 ante), so that the pecuniary position may be adjusted finally and completely.

2 No particular form of assurance is required where unregistered land is to be registered following completion. A conveyance or, in the case of an existing lease, an assignment, in the usual unregistered form will suffice. However, the parties may use a transfer, commonly called a 'rule 72 transfer', that follows the form for registered land subject to certain modifications needed to reflect the fact that the land is not already registered. The use of transfers in respect of unregistered land is made possible by the Land Registration Rules 1925, SI 1925/1093, r 72(1), which provides that a person having the right to apply for registration as first proprietor who desires to deal with the land in any way permitted by the Land Registration Act 1925 before he himself is registered as proprietor may do so in the manner, and subject to the conditions, which would be applicable if he were in fact the registered proprietor. This means that a transfer in the form used for registered land may be used rather than an unregistered form of conveyance on the sale of unregistered land, because registration of title on sale is compulsory throughout England and Wales. As to persons entitled to be registered as proprietors of registered land see the Land Registration Act 1925 s 37(1); and LAND REGISTRATION vol 26 (2004 Reissue) PARA 826. As to compulsory registration see LAND REGISTRATION vol 26 (2004 Reissue) PARA 827 et seq.

3 In strictness a conveyance may not be necessary in the case of the purchase of an equitable interest (see PARA 179 note 5 ante), but it is usual to have a formal conveyance: cf *Fenner v Hepburn* (1843) 2 Y & C Ch Cas 159; and see 1 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 459. As to a condition providing for a free transfer see PARA 130 ante.

4 See PARAS 131-132 ante.

5 As to provisions for the granting of a free transfer and statutory restrictions relating to the preparation of transfers by the vendor's solicitor see PARA 130 ante. See also PARA 3 ante. As to restrictions on the creation of rentcharges see the Rentcharges Act 1977 s 2 (as amended); and RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 774 et seq.

6 Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 240-241. Cf the Statutory Form of Conditions of Sale 1925, SR & O 1925/779, condition 8(1); the Standard Conditions of Sale (3rd Edn), condition 4.1.2, which provide expressly for preparation of the transfer by the purchaser. The latter set of conditions makes special provision for sale by way of lease or underlease: see condition 8. As to the Standard Conditions of Sale see PARA 1 note 9 ante. A transfer in pursuance of the Leasehold Reform Act 1967 will be prepared by the tenant, unless the parties have agreed otherwise: see the Leasehold Reform Act (Enfranchisement and Extension) Regulations 1967, SI 1967/1879, Schedule, Pt I para 9(1). As to matters to be included in and the effect of a conveyance or transfer executed to give effect to a landlord's obligation to enfranchise see the Leasehold Reform Act 1967 ss 8-13 (as amended); and LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1439 et seq. The 'right to buy' provisions of the Housing Act 1985 (see Pt V (ss 118-188) (as amended); and see LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARAS 1795-1922) do not state who is to prepare the transfer, so the general law will apply. As to collective enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended) see LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1552 et seq. As to settling the

transfer on a sale by the court see 2 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 1002; and cf para 136 ante.

7 *Jarmain v Egelstone* (1831) 5 C & P 172.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(1) ASSURING THE PROPERTY AND DISCHARGING INCUMBRANCES/(i) The Transfer and the Duty to Prepare it/263. Transfer of parts of property by separate deeds.

### **263. Transfer of parts of property by separate deeds.**

The purchaser of property included in a single contract may divide it into parts, apportioning the purchase money among the parts, and may require the vendor to transfer the several parts by separate deeds<sup>1</sup>, provided that this does not impose undue trouble on the vendor, and that the purchaser pays the additional costs occasioned by it to the vendor<sup>2</sup>. Where the land is unregistered, the property is frequently conveyed by separate deeds where it comprises distinct estates or land held under different titles, as the inclusion in one deed would render future dealing with the several parts difficult or expensive<sup>3</sup>. However, it may be advantageous, on first registration of title, to combine the several parts into one registered title.

Where a large property is sold in smaller parts it is essential that each parcel transferred is described with such particularity and precision as to leave no room for doubt as to the boundaries<sup>4</sup>.

1 See *Clark v May* (1852) 16 Beav 273.

2 *Earl of Egmont v Smith, Smith v Earl of Egmont* (1877) 6 ChD 469. It is doubtful whether a vendor, in the absence of express stipulation, could be required by the purchaser to transfer the land in parcels by separate transfers at intervals of time. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

3 See 1 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 461; 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 644. However, the purchaser cannot, by having the property transferred to him in separate parts, avoid paying the amount of stamp duty which would be exigible if it were transferred to him as a whole: *A-G v Cohen* [1937] 1 KB 478 at 483, [1937] 1 All ER 27 at 32, CA.

4 See *Scarfe v Adams* [1981] 1 All ER 843 at 845, CA, per Cumming-Bruce LJ; applied in *Mayer v Hurr* (1983) 49 P & CR 56, CA. An Ordnance Survey map of 1:2500 is not adequate for this purpose.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(1) ASSURING THE PROPERTY AND DISCHARGING INCUMBRANCES/(i) The Transfer and the Duty to Prepare it/264. Transfer by deed of freeholds and leaseholds.

### **264. Transfer by deed of freeholds and leaseholds.**

The assurance of freehold property to the purchaser is effected by deed<sup>1</sup>, the form of which is settled by him<sup>2</sup>. An assignment of leasehold property is likewise effected by deed<sup>3</sup>.

1 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 14; and PARA 263 text and note 1 ante.

2 See PARA 262 ante. As to the parties by whom and to whom the assurance is made see PARA 269 et seq post; as to registered land see PARA 265 text and note 8 post; as to the formal parts of a deed see generally DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 27 et seq; and as to the desirability of adhering to

established forms of words in conveyances, transfers and other deeds see *Bromley v Tryon* [1952] AC 265 at 275, [1951] 2 All ER 1058 at 1065, HL. Where there are several incumbrances on the property, including leases or subleases, and these are to determine or be cleared off at completion, it is advisable to clear them off the title by a separate deed and for the vendor then to transfer as owner in fee simple free from incumbrances: cf para 267 post. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

3 See LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 549. As to the matters to be included in such a deed see PARA 300 et seq post.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(1) ASSURING THE PROPERTY AND DISCHARGING INCUMBRANCES/(i) The Transfer and the Duty to Prepare it/265. Form of transfer.

## **265. Form of transfer.**

The form of the transfer is primarily for the purchaser to determine, and the vendor is not entitled to raise objections to the draft save as regards matters of substance affecting himself<sup>1</sup>. Special forms of conveyance are authorised by the enactments relating to the acquisition of land under compulsory powers<sup>2</sup> and to grants of sites for schools<sup>3</sup> and certain other enactments<sup>4</sup>. Enactments prescribing such forms are not affected by the Law of Property Act 1925, but remain in full force<sup>5</sup>. Certain forms are also provided by that Act<sup>6</sup>, and instruments in the form of, and using the expressions in, these forms, or in the like form and using expressions to the like effect, are sufficient in regard to form and expression<sup>7</sup>.

Registered land is transferred to a purchaser by the execution of an instrument of transfer, followed by registration of the purchaser as proprietor of the land<sup>8</sup>.

1 *Clark v May* (1852) 16 Beav 273; *Cooper v Cartwright* (1860) John 679 at 685. As to the reserving to the vendor of the right to furnish a draft form of transfer see PARA 130 text and note 2 ante; and as to the form of assurances of freeholds and leaseholds respectively see PARAS 269 et seq, 300 et seq post. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 See the Lands Clauses Consolidation Act 1845 s 81 (as amended), Schs (A), (B); the Compulsory Purchase Act 1965 s 23(6), Sch 5; and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 658. These forms are seldom used in practice. As to covenants for title when land is so acquired or on a sale of superfluous land by the acquiring authority see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARAS 658, 906.

3 See the School Sites Act 1841 s 10 (as amended); and EDUCATION vol 15(2) (2006 Reissue) PARA 1354. The powers conferred by the Act are no longer necessary and are unlikely to be used in practice.

4 Eg by the Queen Anne's Bounty Act 1838 s 20 (as amended); the Consecration of Churchyards Act 1867 s 5; and the Places of Worship Sites Act 1873 s 4 (as amended): see ECCLESIASTICAL LAW.

5 See the Law of Property Act 1925 s 7(3) (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 246.

6 See *ibid* s 206(1), Sch 5. As to the modification of the statutory form contained in Sch 5 see the Law of Property (Miscellaneous Provisions) Act 1994 s 9; and as to the provisions of the Law of Property (Miscellaneous Provisions) Act 1994 relating to implied covenants for title see PARA 336 et seq post.

7 Law of Property Act 1925 s 206(1).

8 See LAND REGISTRATION. As to the protection of minor interests in registered land see LAND REGISTRATION vol 26 (2004 Reissue) PARA 992 et seq; as to the necessity for the purchaser of land in an area of compulsory registration to prove himself registered as proprietor see PARA 317 post; and as to a transfer of registered land being a deed poll see *Chelsea and Walham Green Building Society v Armstrong* [1951] Ch 853, [1951] 2 All ER 250.

## **UPDATE**

### **265 Form of transfer**

NOTE 4--1838 Act repealed: Statute Law (Repeals) Act 2004.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(1) ASSURING THE PROPERTY AND DISCHARGING INCUMBRANCES/(i) The Transfer and the Duty to Prepare it/266. Vesting order.

## **266. Vesting order.**

Where the court<sup>1</sup> gives a judgment or makes an order directing the sale of land, every person who is entitled to or possessed of any interest in the land, or entitled to a contingent interest, and is a party to the proceedings or otherwise bound by the judgment or order, is deemed a trustee for the purposes of the Trustee Act 1925, and the court may, if it thinks expedient, make an order vesting the land in the purchaser<sup>2</sup>.

The court may also make a vesting order consequential on a judgment for specific performance of a contract concerning any land<sup>3</sup>.

The circumstances in which the court may make vesting orders as to land<sup>4</sup>, or may appoint a person to transfer<sup>5</sup>, and the power of the court to enforce a judgment or order for the execution of a transfer by directing execution by a nominee<sup>6</sup> are dealt with generally elsewhere.

1 'The court' means the High Court or, where it has jurisdiction, the county court: Trustee Act 1925 s 67(1) (definition amended by the Courts Act 1971 s 56(4), Sch 11 Pt II). The county court has jurisdiction under the Trustee Act 1925 ss 47, 48, where the judgment or order is given or made by the court, and under s 50 where a vesting order can be made by the court: Trustee Act 1925 s 63A(3) (s 63A added by the County Courts Act 1984 s 148(1), Sch 2 para 1). The parties may also consent to jurisdiction: see the County Courts Act 1984 s 24 (as amended); and COURTS.

2 Trustee Act 1925 s 47. See also *Re Montagu, Faber v Montagu* [1896] 1 Ch 549 (barring of estate tail). Alternatively, a person may be appointed to transfer the land: Trustee Act 1925 s 50. See also *White v White* (1872) LR 15 Eq 247; *Moorhead v Kirkwood* [1919] 1 IR 225; and TRUSTS vol 48 (2007 Reissue) PARA 879. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

3 See the Trustee Act 1925 s 48; para 253 ante; and SPECIFIC PERFORMANCE vol 44(1) (Reissue) PARA 965; TRUSTS vol 48 (2007 Reissue) PARA 883.

4 See *ibid* ss 44-49; and TRUSTS vol 48 (2007 Reissue) PARA 875 et seq. Where a rector died before completion of the sale of his rectory, he was declared to have been a trustee and a vesting order was made: *Re Peek's Contract* (1920) 65 Sol Jo 220. As to vesting orders when an order for sale is made for the purpose of giving effect to an equitable charge see MORTGAGE vol 77 (2010) PARA 106; and as to vesting orders when a purchaser becomes mentally disordered see PARA 219 ante.

5 See the Trustee Act 1925 s 50; and note 2 supra. As to the appointment of persons to transfer property of minors to raise money for their maintenance see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 71.

6 See CIVIL PROCEDURE.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(1) ASSURING THE PROPERTY AND DISCHARGING INCUMBRANCES/(ii) Discharge of Incumbrances/267. Sale of incumbered land.

## **(ii) Discharge of Incumbrances**

### **267. Sale of incumbered land.**



Where a vendor contracts to sell land which is in fact incumbered, even though this is not shown by the contract, the purchaser may require the vendor at his own expense to obtain the discharge of the incumbrance by separate deed<sup>1</sup>. Before 1926 this right was not usually insisted on<sup>2</sup>, and now that mortgages can be discharged by receipt<sup>3</sup> there is usually no need for a separate surrender or release by the incumbrancer. Where there is no discharge of the incumbrance prior to completion, the incumbrancer can join in the transfer to the purchaser<sup>4</sup>. Satisfied terms, whether or not attendant on the inheritance, cease by statute<sup>5</sup>, but should it be necessary to procure an assignment of a term, this will be at the vendor's expense<sup>6</sup>. Where there is a registered equitable incumbrance which will not be overreached by the transfer to the purchaser, the purchaser may require the registration to be cancelled, or may require that the person entitled concur in the transfer, and in either case free of expense to himself<sup>7</sup>.

Formerly, when an existing incumbrance was to be paid off out of the purchase money, the purchaser was entitled to have it kept on foot for his own protection against subsequent incumbrances<sup>8</sup>, although if the vendor was under any personal liability he could insist on this being discharged<sup>9</sup>. Now only a tenant for life or other limited owner can require a mortgage to be kept alive for his benefit; in other cases a mortgage term becomes a satisfied term and ceases when the money secured by the mortgage has been discharged<sup>10</sup>.

1 Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 555, 557. See also *Jones v Lewis* (1847) 1 De G & Sm 245; and cf *Reeves v Gill* (1838) 1 Beav 375. A stipulation that an outstanding legal estate is to be got in at the expense of a purchaser is void: see the Law of Property Act 1925 s 42(3); and PARA 129 ante. As to the meaning of 'incumbrance' see PARA 346 text to note 6 post.

2 Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 557. It was considered that it was not, as a rule, to the purchaser's advantage to allow the legal estate in incumbered land to become vested in the vendor: 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 646; and see *General Finance, Mortgage and Discount Co v Liberator Permanent Benefit Building Society* (1878) 10 ChD 15 at 20. However, in view of the changes in the law made by the Law of Property Act 1925, it is not now necessary for the purchaser's protection to prevent the legal estate from vesting in the vendor (1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 648), and it is the practice for the vendor to clear his estate before or on completion so that he will be in a position to transfer an unincumbered legal estate. As to the discharge of incumbrances where the transfer is in pursuance of the Leasehold Reform Act 1967 see ss 11-13 (as amended); and LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARAS 1460-1464; and as to a transfer to a tenant exercising his 'right to buy' under the Housing Act 1985 see s 139(1), Sch 6 (as amended); and LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARAS 1795-1922. As to collective enfranchisement under the Leasehold Reform, Housing and Urban Development Act 1993 Pt I Ch I (ss 1-38) (as amended) see LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1552 et seq.

As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

3 This is usually a statutory receipt, although this is not essential: see MORTGAGE vol 77 (2010) PARAS 645, 646.

4 As to the course to be taken where there are several incumbrances see PARA 264 note 2 ante.

5 See the Law of Property Act 1925 s 5(1); and REAL PROPERTY vol 39(2) (Reissue) PARA 113. A term is satisfied when there is no useful purpose to be attained by keeping it on foot: see *Anderson v Pignet* (1872) 8 Ch App 180 at 188.

6 *Stronge v Hawkes* (1856) 2 Jur NS 388.

7 Law of Property Act 1925 s 43(1).

8 *Cooper v Cartwright* (1860) John 679. See also *Barry v Harding* (1844) 1 Jo & Lat 475. As to the method of keeping incumbrances on foot for the benefit of a purchaser see generally MORTGAGE vol 77 (2010) PARA 101 et seq.

9 *Cooper v Cartwright* (1860) John 679.

10 Law of Property Act 1925 s 116. See also *Re Chesters, Whittingham v Chesters* [1935] Ch 77, where a mortgage was kept alive for the protection of a tenant for life in remainder who had paid it off. It follows that an

indorsed receipt under the Law of Property Act 1925 s 115 (as amended) (see MORTGAGE vol 77 (2010) PARAS 369, 645), although useful as evidence of the discharge of the mortgage, is not essential for the cessation of the mortgage term: see *Edwards v Marshall-Lee* (1975) 119 Sol Jo 506, CA. In the case of registered land, an application to register a discharge in Form DS1 is made on Form AP1 or on Form DS2: see the Land Registration Rules 1925, SI 1925/1093, r 151 (as substituted); and LAND REGISTRATION.

## UPDATE

### 267 Sale of incumbered land

NOTES--The fact that land is incumbered with a legal charge due to be discharged on or before the date of purchase does not give rise to a right to rescind the contract of sale: *Herkanaidu v Lambeth LBC* (2000) Times, 28 February.

NOTE 10--SR & O 1925/1093 Forms AP1, DS2 substituted: SI 2000/3225.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(1) ASSURING THE PROPERTY AND DISCHARGING INCUMBRANCES/(ii) Discharge of Incumbrances/268. Incumbrances discharged by payment into court.

### 268. Incumbrances discharged by payment into court.

Where it is desired to sell incumbered land freed from incumbrances, but without joining the incumbrancers as parties, either vendor or purchaser may apply to the court<sup>1</sup> to allow payment into court<sup>2</sup> (1) in the case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of a sum of such amount as when invested in government securities will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for the charge<sup>3</sup>; and (2) in any other case of capital money charged on the land, of an amount sufficient to meet the incumbrance and any interest on it<sup>4</sup>. In either case there must also be paid in an additional amount to meet the contingency of further costs, expenses and interests and any other contingency, except depreciation of investments, not exceeding one-tenth of the original amount to be paid in, unless for special reason the court requires a larger additional amount<sup>5</sup>. Thereupon the court, either after or without notice to the incumbrancer, may declare the land to be freed from the incumbrance, and make any order for transfer, or vesting order, proper for giving effect to the sale<sup>6</sup>. The court may dispense with service of notice on the vendor or purchaser<sup>7</sup>.

1 As to application to the court see the Law of Property Act 1925 s 203(2)(a), (4); and CPR Pts 7, 8. As to the CPR see PARA 133 note 1 ante.

2 As to payment into court generally see CIVIL PROCEDURE. Payment of money into court effectually exonerates therefrom the person making the payment: see the Law of Property Act 1925 s 203(1).

3 Ibid s 50(1)(a).

4 Ibid s 50(1)(b).

5 Ibid s 50(1). See also MORTGAGE vol 77 (2010) PARA 462. This provision applies to sales or exchanges whenever made, and to incumbrances created by statute or otherwise: see s 50(6). An order for sale in an administration action does not have the effect of payment into court under this provision: *Re Evans and Bettell's Contract* [1910] 2 Ch 438. The court does not compel the vendor to submit to payment into court where this would be a hardship to him, but allows him to rescind the contract under a condition for rescission: *Re Great Northern Rly Co and Sanderson* (1884) 25 ChD 788. On an application under this provision the court has decided a question of the construction of a will affecting the existence or amount of incumbrances: *Re Freme's Contract* [1895] 2 Ch 778 at 780, CA.

6 Law of Property Act 1925 s 50(2). See also MORTGAGE vol 77 (2010) PARAS 462, 626. Other land than that sold can be declared free from the incumbrance, notwithstanding that on a previous occasion an order has been made confined to the land then sold: see s 50(3). As to a case where an order discharging the rest of the land had been omitted see *Re Ossemsley's Estates Ltd* [1937] 3 All ER 774, CA. The order does not prevent the vendor from alleging that the incumbrance was statute-barred: *Re M'Swiney and Hartnett's Contract* [1921] 1 IR 178. Without an application to the court, certain equitable incumbrances can be overreached and transferred to the purchase money by the creation of a special trust of land under the Law of Property Act 1925 s 2 (as amended) (see PARA 29 ante), or by a special settlement under the Settled Land Act 1925 s 21: see PARA 272 post; and REAL PROPERTY vol 39(2) (Reissue) PARA 247 et seq; SETTLEMENTS vol 42 (Reissue) PARA 705. In the case of personal representatives, recourse can be had to their overreaching powers: see PARA 271 post; and EXECUTORS AND ADMINISTRATORS; REAL PROPERTY vol 39(2) (Reissue) PARA 250.

As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

7 Law of Property Act 1925 s 50(4).

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(i) Parties/A. PARTIES BY WHOM THE ASSURANCE IS MADE/269. Parties by whom the transfer is made.

## **(2) FORM OF ASSURANCE OF FREEHOLDS**

### **(i) Parties**

#### **A. PARTIES BY WHOM THE ASSURANCE IS MADE**

##### **269. Parties by whom the transfer is made.**

The parties who transfer on the sale of land for an estate in fee simple are determined by the principle that equitable interests are as far as possible kept off the title, and title is made to a purchaser by a transfer of the legal estate<sup>1</sup>. If there are legal mortgages which are not paid off before or on completion, the mortgagees will be parties to surrender or release their incumbrances<sup>2</sup>. Otherwise, the transfer by the person or persons in whom the legal estate in fee simple is vested will in general vest in the purchaser the entire legal and equitable interest in the property.

1 See the Law of Property Act 1925 s 10(1); and PARAS 145-146 ante. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 See PARA 267 ante; and MORTGAGE vol 77 (2010) PARA 101 et seq.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(i) Parties/A. PARTIES BY WHOM THE ASSURANCE IS MADE/270. Capacity of vendor.

##### **270. Capacity of vendor.**

Where the vendor is absolutely entitled to the land, whether freehold or leasehold, both at law and in equity, he can, if of full capacity, transfer it by virtue of his absolute ownership, and he alone is the transferring party<sup>1</sup>. If he is under disability, or has a limited or special capacity, he, or some person on his behalf, may be able to transfer under special statutory or other powers<sup>2</sup>.

A sale of an interest less than the fee simple absolute in possession, or term of years absolute, is a sale of an equitable interest<sup>3</sup>, and the person entitled to it will be the transferring party.

1 As to the parties to transfer on completion of the contract after the death of the vendor see PARA 202 et seq ante. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 See PARA 64 et seq ante. As to transfers of the property of a mentally disordered person in whom the legal estate is vested see the Law of Property Act 1925 s 22(1) (as amended); the Mental Health Act 1983 s 96(1)(b); and MENTAL HEALTH vol 30(2) (Reissue) PARA 687; and as to transfer of the property of a bankrupt see PARA 206 et seq ante.

3 See REAL PROPERTY vol 39(2) (Reissue) PARA 46.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(i) Parties/A. PARTIES BY WHOM THE ASSURANCE IS MADE/271. Transfer overreaching equitable interests.

### **271. Transfer overreaching equitable interests.**

Where the vendor, although the owner of the legal estate, is not also solely entitled in equity, he may have power by his transfer to overreach the equitable interests, which thereupon attach to the proceeds of sale. Such overreaching powers exist where the vendor is selling under the powers of the Settled Land Act 1925<sup>1</sup>, or where the vendors are trustees of land selling under their statutory powers<sup>2</sup>, or are mortgagees<sup>3</sup> or personal representatives<sup>4</sup> selling under their paramount powers<sup>5</sup>. A sale by a mortgagee under his statutory power has a further effect, for while the transfer by him may overreach equitable interests, it also transfers the legal estate of freehold which is vested in the mortgagor and also extinguishes any subsequent mortgage terms or charges<sup>6</sup>. In these cases, therefore, the transfer of the legal estate of freehold by or on behalf of the person or persons in whom it is vested will confer on the purchaser the entire legal and beneficial interest, and that person, or those persons, are alone the transferring party or parties.

1 As to the effect of a transfer under the Settled Land Act 1925 see s 72; and REAL PROPERTY vol 39(2) (Reissue) PARA 248; SETTLEMENTS vol 42 (Reissue) PARA 874. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 See the Law of Property Act 1925 s 2 (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 249; SETTLEMENTS vol 42 (Reissue) PARA 900 et seq; TRUSTS vol 48 (2007 Reissue) PARA 1042.

3 See MORTGAGE vol 77 (2010) PARA 101 et seq; REAL PROPERTY vol 39(2) (Reissue) PARA 250.

4 See EXECUTORS AND ADMINISTRATORS; REAL PROPERTY vol 39(2) (Reissue) PARA 250.

5 See generally the Law of Property Act 1925 s 2(1) (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARAS 247-252.

6 See generally MORTGAGE vol 77 (2010) PARA 440 et seq.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(i) Parties/A. PARTIES BY WHOM THE ASSURANCE IS MADE/272. Special settlement or trust of land.

### **272. Special settlement or trust of land.**

Where the person in whom the legal estate is beneficially vested holds it subject to equitable interests, but there is no subsisting statutory power or trust of land under which the equitable interests can be overreached, a special settlement<sup>1</sup> or trust of land<sup>2</sup> can be created for the purpose, and a stipulation that a purchaser of a legal estate in land is to accept a title made with the concurrence of any person entitled to any equitable interest is void, if a title can be made without such concurrence under a trust of land, or under the Settled Land Act 1925 or other statute<sup>3</sup>.

1 See the Settled Land Act 1925 s 21; and SETTLEMENTS vol 42 (Reissue) PARA 705.

2 See the Law of Property Act 1925 ss 2(2) (as amended), 42(1) (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 247. For the meaning of 'trust of land' see PARA 146 note 3 ante.

3 Ibid s 42(1) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 4(11)).

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(i) Parties/A. PARTIES BY WHOM THE ASSURANCE IS MADE/273. Concurrence of owner of equitable interest.

### **273. Concurrence of owner of equitable interest.**

In general it is possible for the entire legal and equitable interest to be vested in the purchaser by a transfer to which the owner of the legal estate is the only transferring party. Although the scheme of the Law of Property Act 1925 prima facie excludes the concurrence in the transfer of the owners of equitable interests, yet it recognises that such concurrence may be proper<sup>1</sup>, and where an equitable interest cannot be discharged before completion, the convenient course may be to make the equitable owner a party to the transfer<sup>2</sup>.

1 See the Law of Property Act 1925 s 43(1); and PARAS 129, 147 ante.

2 Intermediate trustees are not necessary parties to a transfer by the head trustees and the beneficiaries: *Grainge v Wilberforce* (1889) 5 TLR 436. See also *Head v Lord Teynham* (1783) 1 Cox Eq Cas 57, where it was held that trustees of a term who had the legal estate, and the person having the entire beneficial interest, could sell the term without making an intermediate trustee a party, unless they had acquired a lien on the land for costs and expenses, when, it seems, a purchaser could require their concurrence to discharge the lien (1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 641 note (q)). Such a case could rarely now occur. A condition requiring a purchaser to take a transfer from a trustee implies power in the trustee to transfer: see *Mosley v Hide* (1851) 17 QB 91 at 101. As to the position where two persons contract to transfer as trustees, but the deed appointing one of them has not been executed see *Re Priestley's Contract* [1947] 1 All ER 716.

As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(i) Parties/A. PARTIES BY WHOM THE ASSURANCE IS MADE/274. Transfer on sale by order of the court.

### **274. Transfer on sale by order of the court.**

Where a sale takes place by order of the court the persons to transfer are, as a rule, the persons having the legal estate<sup>1</sup>. The concurrence of persons having equitable interests only, who are parties to the action or have been served with notice of the judgment or order, is

unnecessary<sup>2</sup>. A direction by the court in an action for specific performance that the vendor is to transfer means that the vendor and all necessary parties are to transfer<sup>3</sup>.

1 As to the court's power to make vesting orders or appoint persons to transfer see PARA 266 ante. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 See PARA 133 text and note 4 ante.

3 See *Minton v Kirwood* (1868) 3 Ch App 614. As to specific performance see PARAS 247-253 ante; and SPECIFIC PERFORMANCE.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(i) Parties/A. PARTIES BY WHOM THE ASSURANCE IS MADE/275. Persons joined for collateral purposes.

### **275. Persons joined for collateral purposes.**

Persons who have no estate or interest to transfer are sometimes joined in the assurance for a collateral purpose. Thus, where on a sale by trustees of land the consent of one or more beneficiaries is required, he or they will usually be joined to give the consent<sup>1</sup>. Where the power of trustees to sell depends on the beneficiaries not having all elected to retain land as an investment, one may be joined to show that there has been no such unanimous election<sup>2</sup>.

1 As to the position where the consent of more than two persons is requisite to the execution of a trust of land see the Trusts of Land and Appointment of Trustees Act 1996 ss 10, 11, Sch 4; and TRUSTS vol 48 (2007 Reissue) PARA 1036. For the meaning of 'trust of land' see PARA 146 note 3 ante.

2 This might formerly, and may perhaps still be necessary where trustees who have purchased land without power to invest the trust funds in that way are reselling: see *Re Jenkins and HE Randall & Co's Contract* [1903] 2 Ch 362; and EQUITY vol 16(2) (Reissue) PARA 719. As to the power of trustees of land to invest in land see the Trusts of Land and Appointment of Trustees Act 1996 s 6(3); and TRUSTS vol 48 (2007 Reissue) PARA 1035. As to a sale by a tenant for life under the Settled Land Act 1925 see SETTLEMENTS vol 42 (Reissue) PARAS 826-835.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(i) Parties/A. PARTIES BY WHOM THE ASSURANCE IS MADE/276. Vendor's duty to obtain concurrence of necessary persons.

### **276. Vendor's duty to obtain concurrence of necessary persons.**

The vendor must obtain the concurrence of necessary persons<sup>1</sup>, for example trustees of the legal estate<sup>2</sup>, but he need not obtain the concurrence of unnecessary persons unless he has expressly contracted to do so<sup>3</sup>. Thus, on a sale by a mortgagee under a power of sale, the purchaser cannot require the vendor to obtain the concurrence of the mortgagor<sup>4</sup>, even though the mortgagor has in the mortgage deed agreed to join in any sale if required<sup>5</sup>. A mortgagor vendor who has contracted to sell free from incumbrances must either discharge the mortgage or procure at his own expense the concurrence of the mortgagee<sup>6</sup>.

In modern practice, the vendor's mortgage will often be expected to be discharged out of the proceeds of the sale, and the purchaser, and his mortgagee, can safely accept an undertaking by the vendor's solicitor to discharge the mortgage after completion<sup>7</sup>.

1 It is the vendor's duty to effect the transfer either by force of his own interests or by force of the interests of others which he can control: *Bain v Fothergill* (1874) LR 7 HL 158 at 209. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 *Costigan v Hastler* (1804) 2 Sch & Lef 159 at 166; *Howell v George* (1815) 1 Madd 1 at 11. If they are not bound to transfer at his direction, this, of course, is an objection to the title: see PARA 137 ante.

3 *Corder v Morgan* (1811) 18 Ves 344; *Benson v Lamb* (1846) 9 Beav 502.

4 *Clay v Sharpe* (1802) 18 Ves 346n; *Allen v Martin* (1841) 5 Jur 239. See also the Law of Property Act 1925 ss 101, 103; and MORTGAGE vol 77 (2010) PARA 101 et seq.

5 *Corder v Morgan* (1811) 18 Ves 344. See also MORTGAGE vol 77 (2010) PARA 440.

6 Formerly, under a usual condition of sale, the cost of obtaining the mortgagee's concurrence might have to be borne by the purchaser: see *Re Willett and Argenti* (1889) 60 LT 735. Such a condition would now be void under the Law of Property Act 1925 s 42(3): see PARA 129 ante; and 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 645 note (p).

7 As to the form of undertaking recommended by The Law Society see 'Council News: Undertaking to Discharge Building Society Mortgages' (1986) 83 LS Gaz 3127. Breach of an undertaking by the solicitor is professional misconduct, and is also a breach of the solicitor's duty as an officer of the court: see LEGAL PROFESSIONS vol 65 (2008) PARA 749. A licensed conveyancer is not an officer of the court. See also PARA 3 ante. It is essential that the redemption monies be paid to the solicitor or licensed conveyancer as the duly authorised agent of the mortgagee: see *Edward Wong Finance Co Ltd v Johnson, Stokes & Master (a firm)* [1984] AC 296, [1984] 2 WLR 1, PC. As to the interpretation of an undertaking in standard form by the purchaser's solicitor to the purchaser's mortgagee to obtain a good marketable title see *Barclays Bank plc v Weeks Legg & Dean (a firm)* [1999] QB 309, [1998] 3 All ER 213, CA.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(i) Parties/A. PARTIES BY WHOM THE ASSURANCE IS MADE/277. Transfer by company in liquidation.

## 277. Transfer by company in liquidation.

Where land belonging to a company in liquidation is being transferred<sup>1</sup>, the company in which the legal estate, in the absence of a special order<sup>2</sup>, remains notwithstanding the liquidation<sup>3</sup> is a necessary party, and the seal is affixed on its behalf by the liquidator<sup>4</sup>. In the absence of a special order the liquidator has no estate or interest, legal or equitable, and is not a necessary party to the transfer, but, unless he is an official receiver, he invariably joins to show his concurrence in the sale and to covenant against incumbrances<sup>5</sup>.

1 As to the power of the liquidator of a company to sell its land see PARA 67 ante; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 577; COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 744; as to the effect of winding up upon a pending contract see PARAS 212-215 ante; and as to recitals in transfers see PARAS 284-288 post. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 As to the vesting of company property in liquidator see the Insolvency Act 1986 s 145; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 575.

3 See *Re Oriental Inland Steam Co, ex p Scinde Rly Co* (1874) 9 Ch App 557 at 560; *Ayerst v C & K (Construction) Ltd* [1976] AC 167 at 177, [1975] 2 All ER 537 at 541, HL, per Lord Diplock; and COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 575; COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 745.

4 See COMPANY AND PARTNERSHIP INSOLVENCY vol 7(3) (2004 Reissue) PARA 577; COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) 744. As to the position of liquidators of unregistered companies see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 1147 et seq.

5 See COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 745. The necessity and reason for the liquidator to be joined as a party is challenged by some commentators: see the summary by Adams 'Precedents Editors Notes - What Can One Expect of a Liquidator, After All?' [1983] Conv 177. The company will normally transfer as beneficial owner, but the covenant for title thus implied is likely to be of slight value, in view of the company's impending dissolution: see eg *Butler v Broadhead* [1975] Ch 97, [1974] 2 All ER 401 (no action against contributories after company's dissolution).

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(i) Parties/B. PARTIES TO WHOM THE ASSURANCE IS MADE/278. Transfer to nominee.

## **B. PARTIES TO WHOM THE ASSURANCE IS MADE**

### **278. Transfer to nominee.**

As a rule the transfer is made to the purchaser, but, provided the vendor is not prejudiced, the purchaser can direct it to be made to a nominee<sup>1</sup>, for such estate and interest, not exceeding the interest purchased, as he pleases<sup>2</sup>. Where the purchaser is to enter into covenants with the vendor, the purchaser cannot substitute a new covenantor for himself without the vendor's consent, and in such a case the nominee must not be a person under disability<sup>3</sup>.

1 If the purchaser provides the money on his own account, and not by way of loan to the nominee, and the nominee is a stranger, there is prima facie a resulting trust to the purchaser: see *Dyer v Dyer* (1788) 2 Cox Eq Cas 92 at 93; *Lynch v Clarkin* [1900] 1 IR 178, Ir CA; GIFTS vol 52 (2009) PARA 241 et seq; TRUSTS vol 48 (2007 Reissue) PARA 713. As a rule there is no resulting trust where the transfer is taken in the name of a wife or child: see *Dyer v Dyer* supra; and GIFTS vol 52 (2009) PARA 244; TRUSTS vol 48 (2007 Reissue) PARA 715. In the case of family assets, the strength of these presumptions is now greatly diminished: see eg *Pettitt v Pettitt* [1970] AC 777, [1969] 2 All ER 385, HL; *Falconer v Falconer* [1970] 3 All ER 449, [1970] 1 WLR 1333, CA; and MATRIMONIAL AND CIVIL PARTNERSHIP LAW.

As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 See *Earl of Egmont v Smith, Smith v Earl of Egmont* (1877) 6 ChD 469 at 474 per Jessel MR. However, the vendors are not bound to accept the nominee if the nomination discloses a breach of trust; where, for instance, they are trustees and the nominee is himself one of the trustees: *Delves v Gray* [1902] 2 Ch 606.

3 See further PARA 280 post.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(i) Parties/B. PARTIES TO WHOM THE ASSURANCE IS MADE/279. Sub-purchaser.

### **279. Sub-purchaser.**

When the purchaser has disposed of the land before the completion of the contract, it is usual, for the purpose of saving the expense of the second transfer and double stamp duty, to make the assurance direct to the second purchaser. The disposition may be either by assignment of the contract or resale of the land<sup>1</sup>. Upon an assignment of the contract the original purchaser is not usually a necessary party to the transfer<sup>2</sup>, nor is he a necessary party where there is a resale without increase of price<sup>3</sup>.

1 See PARA 198 et seq ante.



2 It seems, however, that the vendor could require a recital in the conveyance of the original contract and the assignment: see *Hartley v Burton* (1868) 3 Ch App 365. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

3 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 642-643. As to sale at increased price see PARA 280 post. Where the sub-contract is for the sale of the land with a building to be erected on it and the original purchaser has become bankrupt, his trustee can disclaim the sub-contract of sale without being obliged to disclaim the contract of purchase: see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 472.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(i) Parties/B. PARTIES TO WHOM THE ASSURANCE IS MADE/280. Where the original purchaser is a necessary party.

### **280. Where the original purchaser is a necessary party.**

If the original purchaser was bound by the contract to assume a personal liability under the transfer, the vendor is not bound to accept the liability of another person, as where the property sold is an equity of redemption so that the purchaser can be required to enter into a covenant of indemnity against the mortgage debt<sup>1</sup>. In such a case the original purchaser is a necessary party unless the vendor consents to accept the covenant of the assignee or sub-purchaser<sup>2</sup>. Where there is a resale of the land at an increased price, the transfer states the increased price as the consideration and the original purchaser is joined as the party receiving the increase<sup>3</sup>.

1 See PARA 296 text and note 2 post. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 643.

3 The joining of the original purchaser brings onto the title the equitable interest which he obtained under the contract, and any incumbrances created by him on such interest might cause difficulty on a resale: see 1 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 465; 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 642. There would be the same difficulty if the original contract was recited without making the original purchaser a party: see PARA 279 note 2 ante. It is believed, however, that in practice this risk is treated as negligible, and it is usual to join the original purchaser and, unless there is a big increase in price on the sub-sale, it is the practice for him to transfer as trustee (or now, with limited title guarantee). As to registration of the original contract see PARAS 179, 200 ante; as to the right of a sub-purchaser to an abstract of the original contract see PARA 147 ante; and as to a sub-purchaser's right to specific performance see PARA 201 text and note 5 ante.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(i) Parties/B. PARTIES TO WHOM THE ASSURANCE IS MADE/281. Land purchased with partnership money.

### **281. Land purchased with partnership money.**

On a purchase of land with partnership money the transfer should be made to the partners as joint tenants holding the land on trust for the partners as part of their partnership property<sup>1</sup>, or to trustees on the like trusts<sup>2</sup>.

1 As to the presumption that property purchased with partnership money is partnership property see PARTNERSHIP vol 79 (2008) PARA 117. As to oral partnership agreements in the case of a joint purchase of land see *Forster v Hale* (1798) 3 Ves 696 (affd (1800) 5 Ves 308); and PARTNERSHIP vol 79 (2008) PARA 39. As to joint

tenancy generally see REAL PROPERTY vol 39(2) (Reissue) PARA 190 et seq. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 If the land is transferred to partners as joint tenants, without any words showing what the equitable interests are, then, in as much as on the face of the transfer there is a beneficial joint tenancy, the land will be subject to a trust of land: see the Law of Property Act 1925 s 36(1) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 5, Sch 2 para 4(2)); see also *Green v Whitehead* [1930] 1 Ch 38, CA; 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 501 note (r); and REAL PROPERTY vol 39(2) (Reissue) PARAS 64-66, 190 et seq. As to the sale of partnership land on the winding up of the partnership see PARTNERSHIP vol 79 (2008) PARA 206 et seq.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(i) Parties/B. PARTIES TO WHOM THE ASSURANCE IS MADE/282. Transfer to husband and wife.

## **282. Transfer to husband and wife.**

For all purposes of the acquisition of any interest in property under a disposition made after 1925, a husband and wife are treated as two persons<sup>1</sup>. A transfer to a husband and wife should be made to them upon trust for themselves, whether they are intended to hold in equity as joint tenants or tenants in common<sup>2</sup>.

1 See the Law of Property Act 1925 ss 37, 209(2) (repealed).

2 Cf *ibid* ss 34(2), 36(1) (both as amended); and see REAL PROPERTY vol 39(2) (Reissue) PARA 211. As to the respective rights of the husband and wife in property transferred into their joint names see generally MATRIMONIAL AND CIVIL PARTNERSHIP LAW. As to joint tenancies see REAL PROPERTY vol 39(2) (Reissue) PARAS 190-206; and as to tenancies in common see REAL PROPERTY vol 39(2) (Reissue) PARAS 207-223. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(i) Parties/B. PARTIES TO WHOM THE ASSURANCE IS MADE/283. Right of persons not parties to take interest.

## **283. Right of persons not parties to take interest.**

An immediate or other interest in land may be taken by a person not named as a party to a disposition<sup>1</sup>, if the disposition purports to grant him something<sup>2</sup>. However, a grant cannot be effectually made to persons not in existence at the date of the deed, whether future born persons<sup>3</sup> or persons then dead<sup>4</sup>.

1 See the Law of Property Act 1925 s 56(1), replacing in part the Real Property Act 1845 s 5 (repealed); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 61. The Law of Property Act 1925 s 56(1) applies only to land: see *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL. As to the right of persons not parties to take the benefit of covenants see PARA 335 post.

2 *White v Bijou Mansions Ltd* [1937] Ch 610 at 625, [1937] 3 All ER 269 at 279 (affd [1938] Ch 351, [1938] 1 All ER 546, CA); *Re Ecclesiastical Comrs for England's Conveyance* [1936] Ch 430. See also eg *Stromdale and Ball Ltd v Burden* [1952] Ch 223, [1952] 1 All ER 59, where an option to purchase the reversion was granted to the intended assignee of a tenancy by a deed made between the landlord and tenant, and the assignee was held entitled to enforce the option although not a party to the deed. It is not sufficient in an action under the Law of Property Act 1925 s 56(1) for the plaintiff to show that the deed would benefit him: *White v Bijou Mansions Ltd* supra (where the claim was to the benefit of a restrictive covenant); *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL; *Lysus v Prowsa Developments Ltd* [1982] 2 All ER 953, [1982] 1 WLR 1044;

*Pinemain Ltd v Welbeck International Ltd* (1984) 272 Estates Gazette 1166; *Re Distributors and Warehousing Ltd* [1986] 1 EGLR 90, 278 Estates Gazette 1363.

3 *Kelsey v Dodd* (1881) 52 LJ Ch 34 at 39; *Dyson v Forster* [1909] AC 98, HL; *Westhoughton UDC v Wigan Coal and Iron Co Ltd* [1919] 1 Ch 159, CA.

4 *Re Tilt, Lampet v Kennedy* (1896) 74 LT 163; and see GIFTS vol 52 (2009) PARA 220.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(ii) Recitals/284. Nature of recitals.

## (ii) Recitals

### 284. Nature of recitals.

After stating the parties<sup>1</sup>, a conveyance of unregistered land usually continues with recitals<sup>2</sup>, which are intended either to explain the operation of the deed or to make evidence of matters of fact. Under the former head recitals are introduced to show the interests of the various parties, and the purpose and effect of their concurrence<sup>3</sup>. In consequence, however, of the transfer not disclosing, as a general rule, equitable interests<sup>4</sup>, recitals are not so much required as formerly<sup>5</sup>.

Where the vendor is absolutely entitled to the whole estate in freehold property his seisin in fee is recited<sup>6</sup>, or recitals may be omitted altogether. Where he is not an absolute owner, the recitals show how he is entitled to make the assurance<sup>7</sup>. Where the vendor is a company which is being wound up<sup>8</sup>, the winding up and appointment of the liquidator must be recited<sup>9</sup>.

1 As to parties see PARA 269 et seq ante.

2 A vendor is not bound to admit into the deed recitals at variance with the truth, nor can he insist on the insertion of recitals explaining the title of other parties to the deed if, in fact, all necessary persons are parties: *Hartley v Burton* (1868) 3 Ch App 365. Recitals can frequently be avoided or shortened by making the deed supplemental to a previous deed. The deed then takes effect as if it were indorsed on the previous deed, or contained a full recital of it: see the Law of Property Act 1925 s 58. As to the construction of recitals see generally DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 217 et seq. As to a recital that the grantee is entitled in equity see PARA 150 note 4 ante; and 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 298 et seq. As to the reduced need for recitals see PARA 285 post. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

3 1 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 471; 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 649; Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 558.

4 See PARA 145 et seq ante.

5 In the case of registered land, because of the statutory provisions relating to the vesting of the legal estate in the registered proprietor, there will be no need for recitals showing the devolution of the legal estate: see LAND REGISTRATION.

6 As to seisin see PARA 154 ante. The recital may be that the vendor is estate owner in respect of the fee simple. As to the effect of the recital see PARA 150 note 4 ante. Where co-owners in fee are seised of unincumbered land or trustees of land are so entitled under a trust deed framed to keep the equities off the title, it seems not to be technically correct to recite simply that they are so seised, the conveyancing rule being that the origin of every trust or power must be shown by recital. A recital that a vendor is seised in unincumbered fee simple in possession does not negative the possibility of the land being subject to a lease: *District Bank Ltd v Webb* [1958] 1 All ER 126, [1958] 1 WLR 148.

7 The insertion of such recitals is usually required in the interest of the purchaser, and if they are omitted in the draft conveyance the vendor can probably insist on them: see 1 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 471.

8 As to the parties to such a transfer see PARA 277 ante.

9 Where the winding up is voluntary, the resolution for winding up under which the liquidator is appointed must be recited; where the winding up is compulsory, the winding-up order and order appointing the liquidator should be recited. As to voluntary winding up see COMPANY AND PARTNERSHIP INSOLVENCY vol 7(4) (2004 Reissue) PARA 939 et seq.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(ii) Recitals/285. Recitals as evidence.

### **285. Recitals as evidence.**

A person is bound by the recitals in a deed to which he is a party, whenever they refer to specific facts and are certain, precise and unambiguous<sup>1</sup>. By statute<sup>2</sup>, recitals contained in instruments more than 20 years old are prima facie evidence of the facts recited, and a purchaser must in general assume the correctness of recitals contained in abstracted instruments and relating to documents prior to the commencement of title<sup>3</sup>. Accordingly, facts or events, such as deaths or matters of pedigree, on which the title depends, and which would not otherwise appear from the documents of title, would formerly have been recited with a view to the recitals being used as evidence on a future sale, or to assist a purchaser by giving him information where the proper certificates of those facts may be procured. In order to shorten the recitals, these matters, and also the effect of documents, may have been stated in a schedule. Since, however, most transactions concerning the legal estate now give rise to first registration of title<sup>4</sup>, the need for such recitals is greatly reduced, if not entirely eliminated.

1 See ESTOPPEL vol 16(2) (Reissue) PARA 1015.

2 Ie by the Law of Property Act 1925 s 45(6): see BOUNDARIES vol 4(1) (2002 Reissue) PARA 904.

3 See PARA 150 ante.

4 As to compulsory registration see the Land Registration Act 1925 ss 123 (as substituted), 123A (as added); and LAND REGISTRATION vol 26 (2004 Reissue) PARA 827.

### **UPDATE**

### **285 Recitals as evidence**

NOTE 4--Land Registration Act 1925 repealed and replaced by the Land Registration Act 2002; see LAND REGISTRATION.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(ii) Recitals/286. Incumbrances.

### **286. Incumbrances.**

Where outstanding estates are got in or released by the transfer, or where at the date of the contract<sup>1</sup> the land is subject to incumbrances, and the incumbrancers are paid off on completion<sup>2</sup> and join in the transfer, the recitals<sup>3</sup> show the title of these additional parties<sup>4</sup>.

1 As to the formation of the contract see PARAS 23-40 ante.

2 As to completion of the contract see PARAS 262-325 ante.

3 As to the nature of recitals see PARA 284 ante. As to the reduced need for recitals see PARA 285 ante. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

4 See 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 650. Formerly, where a transfer was made in exercise of a power, the recitals showed how the power was created, how it had become exercisable and that all necessary consents had been obtained. Perhaps a transfer may still be taken in this way: 1 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 472. However, since, in general, powers now operate in equity only (see the Law of Property Act 1925 s 1(7); and POWERS), such a transfer would be unusual.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(ii) Recitals/287. Matters not to be recited.

### **287. Matters not to be recited.**

No document or matters which are irrelevant should be recited<sup>1</sup>, nor should the preliminary contract be recited as a document<sup>2</sup> save under special circumstances, where, for instance, the contract is in pursuance of an order for sale by the court<sup>3</sup>, or one of the parties has died before completion<sup>4</sup>.

1 See 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 650. As to the reduced need for recitals see PARA 285 ante. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 See 1 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 475. It is usual to recite that the vendor has agreed to sell and the purchaser to buy, but not to refer to any written contract, since this would bring it on the title. As to subsales see PARA 279 note 2 ante. As to recitals in the case of a subsale see the forms of transfer referred to in PARA 280 note 3 ante. As to the formation of the contract see PARAS 23-40 ante.

3 As to sales under court orders generally see PARAS 133-136 ante.

4 As to the effect of the death of the vendor or purchaser before completion see PARAS 202-205 ante; and as to completion of the contract see PARAS 262-325 ante.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(ii) Recitals/288. Purchase by exercise of option in lease.

### **288. Purchase by exercise of option in lease.**

Where the purchase is in the exercise of an option contained in a lease, the better practice is not to recite the option but to treat the transaction as an ordinary purchase by agreement with the lessor<sup>1</sup>.

1 This practice avoids any difficulties arising (1) from the option itself being invalid; (2) from irregularities in the exercise of the option; and (3) from questions whether the option is vested in an assignee of the lease. As to this last point see *Griffith v Pelton* [1958] Ch 205, [1957] 3 All ER 75, CA; *Re Button's Lease, Inman v Button* [1964] Ch 263, [1963] 3 All ER 708. See also PARA 27 ante; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 135. As to the reduced need for recitals see PARA 285 ante.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(iii) Operative Parts of Transfer/289. Consideration.

### **(iii) Operative Parts of Transfer**

#### **289. Consideration.**

The consideration for the transfer must be stated in order to prevent the transfer being deemed voluntary<sup>1</sup> and to comply with the statutory provisions as to stamps<sup>2</sup>.

1 As to the avoidance in certain circumstances of voluntary transfers see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 409 et seq; and as to titles commencing with voluntary conveyances see PARA 142 text and notes 11-12 ante. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 See the Stamp Act 1891 s 5; *Lap Shun Textiles Industrial Co Ltd v Collector of Stamp Revenue* [1976] AC 530, [1976] 1 All ER 833, PC; para 97 ante; and STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1007. As to the effect of the receipt formerly indorsed on, but now included in, the deed see PARAS 309-310 post. Before 1926, the statement of the consideration was necessary also in order to prevent a resulting use to the grantor where there was no assurance 'to the use of' the grantee: see generally DEEDS AND OTHER INSTRUMENTS.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(iii) Operative Parts of Transfer/290. Operative words.

#### **290. Operative words.**

The word 'grant' has been described as one of the largest and most beneficial to the purchaser that can be used<sup>1</sup>, but it is not necessary to use it in order to transfer tenements or hereditaments, corporeal or incorporeal; and the words 'convey' or 'transfer' are normally used<sup>2</sup>.

1 Co Litt 301b. The Real Property Act 1845 s 2 (repealed), made the word 'grant' appropriate, but not essential, to pass all hereditaments, corporeal and incorporeal. Section 2 was repealed by the Law of Property Act 1925 s 207, Sch 7 (repealed). The use of the word 'grant' is now not necessary to convey land or to create any interest in it: see s 51(2); and REAL PROPERTY vol 39(2) (Reissue) PARA 239. As to the effect of the word 'grant' in conveyances by undertakers of superfluous land see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 906. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 See the Law of Property Act 1925 ss 205(1)(ii), 206, Sch 5, Form 3. In relation to covenants implied by virtue of s 76 (repealed) see the Law of Property (Miscellaneous Provisions) Act 1994 s 9; and PARA 338 post.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(iii) Operative Parts of Transfer/291. Parcels.

#### **291. Parcels.**

Frequently the property transferred is described both by words<sup>1</sup> and by reference to a plan<sup>2</sup>. A description which is sufficient without reference to a plan may be enough, but the purchaser, at any rate in simple cases, can insist on a plan in order to supplement the general description in the transfer<sup>3</sup>. Land comprised in a registered title<sup>4</sup> is described by reference to a filed plan, usually with a verbal description, and any transfer will be by reference to the particulars in Her

Majesty's Land Registry<sup>5</sup>. The description of the parcels in the transfer should correspond with the description in the contract for sale<sup>6</sup>. General words<sup>7</sup> conveying or transferring appurtenances and conveying or creating easements are generally omitted in reliance upon the statutory provisions by which general words are to be implied in transfers<sup>8</sup>. An 'all estates clause' is similarly omitted in reliance upon the statutory provision by which such a clause is implied<sup>9</sup>. Exceptions or reservations out of the property transferred must be specially mentioned<sup>10</sup>, unless they are implied by law<sup>11</sup>.

1 As to the circumstances in which additions to a description which are at variance with it will be rejected and the circumstances in which effect will be given to them as restrictions of the description see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 226-228; and as to the necessity for accurate description see BOUNDARIES vol 4(1) (2002 Reissue) PARA 904 et seq. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 As to plans generally see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 229. The plan should, if possible, be based on the Ordnance Survey map, and reference to the edition, sheet and number is advisable. It is essential that the plan should be on such a large scale as to show clearly where the boundaries run: see *Scarfe v Adams* [1981] 1 All ER 843 at 845, 125 Sol Jo 32 at 32 per Cumming-Bruce LJ, CA, applied in *Mayer v Hurr* (1983) 49 P & CR 56, CA. As to the inference to be drawn from the plan see *AJ Dunning & Sons (Shopfitters) Ltd v Sykes & Son (Poole) Ltd* [1987] Ch 287 at 299, [1987] 1 All ER 700 at 705-706, CA, per Dillon LJ. As to the admissibility of plans and maps generally see BOUNDARIES vol 4(1) (2002 Reissue) PARA 939; CIVIL PROCEDURE vol 11 (2009) PARA 758 et seq. A plan may be used to supplement an inadequate description in particulars of sale: *Wigginton and Milner Ltd v Winster Engineering Ltd* [1978] 3 All ER 436, [1978] 1 WLR 1462, CA. A clearly defined boundary on a plan may rebut the hedge and ditch presumption: see *Fisher v Winch* [1939] 1 KB 666, [1939] 2 All ER 144, CA; *Alan Wibberley Building Ltd v Insley* [1998] 2 All ER 82, [1998] 1 WLR 881, CA (revd (1999) Times, 30 April, HL).

3 See note 2 supra. Under the Standard Conditions of Sale (3rd Edn), the vendor need not (1) prove the exact boundaries of the property; (2) prove who owns fences, ditches, hedges or walls; (3) separately identify parts of the property with different titles further than he may be able to do from information in his possession: condition 4.3.1(a)-(c). As to the Standard Conditions of Sale see PARA 1 note 9 ante.

4 As to registered land generally see LAND REGISTRATION.

5 As to Her Majesty's Land Registry see LAND REGISTRATION.

6 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 230.

7 As to the construction of general words of description see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 233.

8 See the Law of Property Act 1925 s 62; the Land Registration Act 1925 ss 19(3), 22(3); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 236; LAND REGISTRATION. As to the easements which will be deemed to be included see EASEMENTS AND PROFITS A PRENDRE. The statutory provisions apply only if and so far as a contrary intention is not expressed: Law of Property Act 1925 s 62(4); Land Registration Act 1925 ss 19(3), 22(3). A transfer under which the statutory implication has an unintended effect will be rectified: *Clark v Barnes* [1929] 2 Ch 368. These statutory provisions do not apply on compulsory acquisition: *Sovmots Investments Ltd v Secretary of State for the Environment* [1979] AC 144, [1977] 2 All ER 385, HL. See also *Deen v Andrews* (1986) 52 P & CR 17. As to modifications of the effect of the statutory provisions see the Standard Conditions of Sale (3rd Edn), condition 3.4; and PARA 81 note 8 ante.

9 See the Law of Property Act 1925 s 63. See however, *Cedar Holdings Ltd v Green* [1981] Ch 129, [1979] 3 All ER 117, CA, disapproved by Lord Wilberforce in *Williams and Glyn's Bank Ltd v Boland* [1981] AC 487 at 507, [1980] 2 All ER 408 at 415, HL (see PARA 248 note 7 ante); *First National Securities Ltd v Hegerty* [1985] QB 850, [1984] 3 All ER 641, CA; *Thames Guaranty Ltd v Campbell* [1985] QB 210 at 227-229, [1984] 2 All ER 585 at 598-599, CA, per Slade LJ; and *Ahmed v Kendrick* (1987) 56 P & CR 120, (1988) Fam Law 201, CA. As to all estates clauses see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 240-241.

10 As to exceptions and reservations see generally DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 237-239; EASEMENTS AND PROFITS A PRENDRE. Formerly, where there was a reservation to the vendor, the conveyance had to be executed by the purchaser for the reservation to take effect at law, but this is not now necessary: see the Law of Property Act 1925 s 65(1); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 239. As to a reservation still taking effect by way of grant and regrant see *Johnstone v Holdway* [1963] 1 QB 601, [1963] 1 All ER 432, CA; and *St Edmundsbury and Ipswich Diocesan Board of Finance v Clark (No 2)*

[1975] 1 All ER 772, [1975] 1 WLR 468, CA. As to the effect of the Law of Property Act 1925 s 65(2) in creating new easements see *Wiles v Banks* (1984) 50 P & CR 80, CA.

11 Eg where a vendor sells part of his land and retains the remainder, there is an implied reservation of such rights and easements over the part transferred as are necessary to the enjoyment of the part retained. Unless they are easements of necessity they must be expressly reserved: see EASEMENTS AND PROFITS A PRENDRE. See however, the Standard Conditions of Sale (3rd Edn), condition 3.4; and PARA 81 note 8 ante.

## UPDATE

### 291 Parcels

NOTE 8--Land Registration Act 1925 repealed and replaced by the Land Registration Act 2002; see LAND REGISTRATION.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(iii) Operative Parts of Transfer/292. Habendum.

### 292. Habendum.

The habendum limits the estate granted and any liabilities or incidents subject to which the property is transferred<sup>1</sup>, but the mere statement that the property is subject to a restriction is not effective unless there is a corresponding restrictive covenant<sup>2</sup>. The vendor cannot insist on land being transferred subject to covenants, conditions or restrictions not mentioned in the contract, or which, although mentioned there, are not referred to in the particulars or the abstract<sup>3</sup>.

1 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 242. Where there are a number of rights etc to which the property is subject, it is often convenient to make these the subject of a separate clause in the transfer. It was formerly necessary to include the words 'in fee simple' in the transfer because the covenant for right to convey implied by the Law of Property Act 1925 s 76(1)(A), Sch 2 Pt I (as amended), extended only to the subject matter expressed to be conveyed. As to the reform of the law relating to statutory covenants for title see PARAS 336-337 post; as to covenants for title implied by statute before 1 July 1995 see PARAS 338-348 post; and as to covenants implied by statute on or after 1 July 1995 see PARAS 349-351 post. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 *Re Rutherford's Conveyance, Goadby v Bartlett* [1938] Ch 396, [1938] 1 All ER 495. As to restrictive covenants generally see EQUITY vol 16(2) (Reissue) PARA 613 et seq.

3 *Hardman v Child* (1885) 28 ChD 712; *Re Wallis and Barnard's Contract* [1899] 2 Ch 515. As to the importance of carefully drafting the particulars see PARA 89 ante. As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 ante.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(iii) Operative Parts of Transfer/293. Covenants by vendor and purchaser.

### 293. Covenants by vendor and purchaser.

The vendor's covenants include covenants for title, express or implied<sup>1</sup>, and any special covenants to suit particular circumstances<sup>2</sup>. The purchaser's covenants include covenants, stipulated for in the contract, which restrict the rights he would otherwise possess over the



property, and also covenants indemnifying the vendor against any incumbrances subject to which it is sold<sup>3</sup>.

Where the whole of the land sold is subject to a rentcharge, or a part only of the land so subject is sold, covenants on the part of the purchaser, or mutual covenants by purchaser and vendor, are implied by statute for payment of the rentcharge or an apportioned part of it and for indemnity<sup>4</sup>.

Where an executory contract is intended to be carried out by a purchase deed, it is merged in the deed; the final contract is that which is contained in the deed, and the executory contract cannot be used for the purpose of enlarging, diminishing or modifying what is contained in the deed<sup>5</sup>. Accordingly, any obligations of either party which will not be discharged at the time of completion and which do not from their nature or the terms of the contract survive after completion must be provided for by the covenants<sup>6</sup>. A provision for vacant possession on completion does not merge in the transfer<sup>7</sup>.

1 As to covenants generally see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 247 et seq. As to the covenants for title implied by statute see PARAS 336-351 post; as to the covenants for title where the vendor transfers in pursuance of an obligation to enfranchise under the Leasehold Reform Act 1967 see s 10 (as amended); and LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1452. As to the position where the transfer is to a tenant exercising his right to buy see LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARA 1851 et seq.

2 As to the benefit and burden of covenants relating to land generally see PARA 331 et seq post; and as to covenants for title see PARAS 336-351 post.

3 A solicitor is negligent where he allows his client to enter in ignorance into improper covenants: see *Stannard v Ullithorne* (1834) 10 Bing 491; and LEGAL PROFESSIONS vol 66 (2009) PARA 823. The Standard Conditions of Sale (3rd Edn), provide that if there is more than one vendor or more than one purchaser, the obligations which they undertake can be enforced against them all jointly or against each individually: condition 1.2. As to the Standard Conditions of Sale see PARA 1 note 9 ante.

4 See the Law of Property Act 1925 s 77(1) (as amended), Sch 2 Pts VII, VIII; the Rentcharges Act 1977 s 11 (as amended); and RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 776. As to dispositions of property made before 1 July 1995 see PARAS 338-348 post; and as to the dispositions of property made on or after 1 July 1995 see PARAS 349-351 post. Where the rent is apportioned, charges by the vendor and purchaser of the apportioned parts on their respective lands are sometimes added, but the contract must expressly provide for such an addition. As to apportionment generally see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 278.

5 *Leggott v Barrett* (1880) 15 ChD 306 at 309, CA; *Re Cooper and Crondace's Contract* (1904) 90 LT 258; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 187. In the case of registered land, the transfer represents the conveyance: *Knight Sugar Co Ltd v Alberta Railway and Irrigation Co* [1938] 1 All ER 266, PC. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

6 See *Williams v Morgan* (1850) 15 QB 782; *Teabay v Manchester, Sheffield and Lincolnshire Rly Co* (1883) 24 ChD 572; *Palmer v Johnson* (1884) 13 QBD 351, CA; *Greville v Hemingway* (1902) 87 LT 443 at 445. See also *Barclays Bank Ltd v Beck* [1952] 2 QB 47, [1952] 1 All ER 549, CA. See however, the Standard Conditions of Sale (3rd Edn), condition 7.4; and PARA 123 note 12 ante. As to the date of completion see PARAS 120, 185 ante.

7 *Hissett v Reading Roofing Co Ltd* [1970] 1 All ER 122, [1969] 1 WLR 1757. See also *Hancock v BW Brazier (Anerley) Ltd* [1966] 2 All ER 901, [1966] 1 WLR 1317, CA; and *Eagon v Dent* [1965] 3 All ER 334. As to vacant possession see PARA 123 ante.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(iii) Operative Parts of Transfer/294. Covenants for title.

## 294. Covenants for title.

In the transfer of the property the vendor usually enters into covenants for title<sup>1</sup>, in pursuance of his obligation to give a title clear of defects and incumbrances, unless otherwise provided by the contract<sup>2</sup>.

1 As to the reform of the law relating to statutory covenants for title see PARAS 336-337 post; as to the old law see PARAS 338-348 post; and as to the new law relating to implied covenants for title see PARAS 349-351 post. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 See PARAS 137 ante, 336-337 post.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(iii) Operative Parts of Transfer/295. Covenants as to unpaid consideration.

### **295. Covenants as to unpaid consideration.**

Where the consideration is of such a nature that it is not payable on completion of the contract, the purchaser enters into a covenant to pay it<sup>1</sup>.

1 See eg *Bower v Cooper* (1843) 2 Hare 408 at 410; *Dixon v Gayfer* (1857) 1 De G & J 655. See also *Remington v Deverall* (1795) 2 Anst 550. Where the purchase price is payable by instalments the safer course is to postpone completion until all the instalments have been paid: see PARA 128 ante. As to the operation of a condition for the payment of purchase money by instalments see PARA 232 note 9 ante; and as completion see PARAS 262-325 post.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(iii) Operative Parts of Transfer/296. Covenants indemnifying vendor.

### **296. Covenants indemnifying vendor.**

Where a vendor sells land in respect of which he is personally subject to some liability or burden, the purchaser must covenant to indemnify the vendor against his liability<sup>1</sup>. Thus, on the sale of an equity of redemption, the purchaser must covenant to indemnify the vendor against the mortgage debt and interest<sup>2</sup>.

1 *Moxhay v Inderwick* (1847) 1 De G & Sm 708; *Re Poole and Clarke's Contract* [1904] 2 Ch 173, where the court stated what is now the substance of the usual form of indemnity. Cf *Lukey v Higgs* (1855) 3 Eq Rep 510.

2 *Waring v Ward* (1802) 7 Ves 332 at 337; *Bridgman v Daw* (1891) 40 WR 253; *Adair v Carden* (1892) 29 LR 469. See also *Dodson v Downey* [1901] 2 Ch 620 (sale of partnership share); and MORTGAGE vol 77 (2010) PARA 540. As to the covenants implied in a transfer of and subject to a rentcharge see PARA 293 ante; and RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 776.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(iii) Operative Parts of Transfer/297. Indemnity in respect of restrictive covenants.

### **297. Indemnity in respect of restrictive covenants.**

Where land is sold subject to restrictive covenants, and the vendor will be under any liability in respect of a breach after the execution of the transfer<sup>1</sup>, he is entitled to a covenant of indemnity from the purchaser in case of breach<sup>2</sup>. Nevertheless, where a contract for the sale of land makes no mention that the land is subject to a restrictive covenant, the purchaser may insist on a transfer according to the terms of the contract, and is not bound to have such a restrictive covenant inserted in the transfer<sup>3</sup>; consequently he gives no covenant of indemnity against it. However, in the case of a covenant entered into before 1926, he may be liable to observe it on the ground that he took with notice of its existence<sup>4</sup>.

1 In some cases the covenant by its terms does not affect a covenantor who has parted with all his interest in the land, and he is not then entitled to an indemnity. Even where this is not the case, a person who is an assignee of the covenantor is not entitled to an indemnity unless he himself has given an indemnity in the transfer to him. As to restrictive covenants generally see EQUITY vol 16(2) (Reissue) PARA 613 et seq. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 *Moxhay v Inderwick* (1847) 1 De G & Sm 708; *Re Poole and Clarke's Contract* [1904] 2 Ch 173, CA; *Reckitt v Cody* [1920] 2 Ch 452. Such an indemnity is expressly provided for in the Standard Conditions of Sale (3rd Edn), condition 4.5.4: see PARA 57 note 5 ante. As to the Standard Conditions of Sale see PARA 1 note 9 ante. As to covenants of indemnity in relation to assignments of leases see PARA 302 post; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 573 et seq.

3 See PARA 293 ante.

4 *Re Wallis and Barnard's Contract* [1899] 2 Ch 515 at 522; *Re Gloag and Miller's Contract* (1883) 23 ChD 320 at 327. As to the need to register restrictive covenants, other than those between lessor and lessee, entered into after 1925 see EQUITY vol 16(2) (Reissue) PARA 620; LAND CHARGES vol 26 (2004 Reissue) PARA 635. Where such covenants are first imposed by the transfer, a special condition may be necessary to enable the vendor to secure the priority of the covenants: see eg the National Conditions of Sale (20th Edn), condition 19.4. As to the registration of a priority notice see LAND CHARGES vol 26 (2004 Reissue) PARA 614; as to restrictive covenants where the land is sold on a building scheme see EQUITY vol 16(2) (Reissue) PARA 624 et seq; and as to the liability of a purchaser with knowledge of a covenant for inducement of breach of covenant see *Earl of Sefton v Tophams Ltd* [1965] Ch 1140, [1965] 3 All ER 1, CA (revsd on other grounds sub nom *Tophams Ltd v Earl of Sefton* [1967] 1 AC 50, [1966] 1 All ER 1039, HL); *Esso Petroleum Co Ltd v Kingswood Motors (Addlestone) Ltd* [1974] QB 142, [1973] 3 All ER 1057; *Midland Bank Trust Co Ltd v Green (No 3)* [1982] Ch 529, [1981] 3 All ER 744, CA (tort of conspiracy).

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(iii) Operative Parts of Transfer/298. Indorsement of notice of restrictive covenants.

## **298. Indorsement of notice of restrictive covenants.**

Where unregistered land<sup>1</sup> having a common title with other land is disposed of to a purchaser<sup>2</sup> (other than a lessee or mortgagee) who does not hold or obtain possession of the documents forming the common title, then, notwithstanding any stipulation to the contrary, he may require notice of any provision in his conveyance restrictive of the user of, or giving rights over, any other land comprised in the common title to be indorsed on or, where indorsement is impracticable, permanently annexed to, a document selected by him forming part of the common title which is retained by the vendor<sup>3</sup>. However, omission to require such an indorsement or annexation does not affect the title<sup>4</sup>.

1 This provision does not apply to dispositions of registered land: see the Law of Property Act 1925 s 200(3). As to registered land see generally LAND REGISTRATION. For the meaning of 'land' see PARA 139 note 1 ante.

2 For the meaning of 'purchaser' see PARA 55 note 16 ante.

3 See the Law of Property Act 1925 s 200(1). As to restrictive covenants generally see EQUITY vol 16(2) (Reissue) PARA 613 et seq.

4 See *ibid* s 200(2). The indorsement does not affect the obligation to register the restrictive covenant or agreement affecting freehold land as a land charge: s 200(4)(a). As to the need to register restrictive covenants, other than those between lessor and lessee, entered into after 1925 see LAND CHARGES vol 26 (2004 Reissue) PARA 635; EQUITY vol 16(2) (Reissue) PARA 620.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(2) FORM OF ASSURANCE OF FREEHOLDS/(iii) Operative Parts of Transfer/299. Acknowledgment of right to production; certificate of value.

### **299. Acknowledgment of right to production; certificate of value.**

Where any of the documents of title relate to land of the vendor which is not included in the sale to the purchaser, it is the practice for the vendor to retain these documents and give an acknowledgment in writing of the purchaser's right to production and delivery of copies, and also, where he is not a trustee or mortgagee, an undertaking for safe custody, and in such a case certain statutory provisions apply to the acknowledgment<sup>1</sup>. Such an acknowledgment and undertaking are binding on the vendor only while he has possession or control of the documents, and are binding on future possessors of the documents during the period of their possession or control<sup>2</sup>. As a rule, the acknowledgment and undertaking are contained in the transfer, although, where it is desired to keep the documents to which they relate off the title, they are given by a separate document<sup>3</sup>. Apart from the purchaser's rights under an acknowledgment, he has an equitable right to the production of documents in the possession of another person which form the common title to their land<sup>4</sup>. Although a transfer can be made by a person to himself<sup>5</sup>, the acknowledgment cannot be included in such a transfer, since the statutory provisions relating to acknowledgments apply only to an acknowledgment given to another<sup>6</sup>, but this disability does not apply where the transfer is by a person to himself and other persons<sup>7</sup>.

The transfer will generally conclude with a certificate of value<sup>8</sup>.

1 See the Law of Property Act 1925 s 64; and PARA 132 ante. It is the practice for trustees and mortgagees not to give the undertaking (see 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 702; cf *Re Agg-Gardner* (1884) 25 ChD 600), but the correctness of this practice has been questioned (see (1893) 37 Sol Jo 4, 73-74, 78-79; The Solicitor, February 1947, 28). The Standard Conditions of Sale (3rd Edn), provide that the vendor is to arrange at his expense that, in relation to every document of title which the purchaser does not receive on completion, the purchaser is to have the benefit of (1) a written acknowledgment of his right to production; and (2) a written undertaking for its safe custody (except while it is held by a mortgagee or by somebody in a fiduciary capacity): condition 4.5.5. As to the Standard Conditions of Sale see PARA 1 note 9 ante. By reason of the notices which may be indorsed upon them (see EXECUTORS AND ADMINISTRATORS), probates and letters of administration are documents of title and should be included in an acknowledgment: *Re Miller and Pickersgill's Contract* [1931] 1 Ch 511.

2 See the Law of Property Act 1925 s 64(2), (9). The statutory obligation imposed by an acknowledgment is (1) to produce the documents at all reasonable times for inspection; (2) to produce the documents for the purposes of litigation; and (3) to deliver copies of them (see s 64(4)); and that imposed by an undertaking is to keep the documents safe, whole, uncanceled and undefaced unless prevented by fire or other inevitable accident (see s 64(9)). See also PARA 132 ante.

3 This document need only be under hand, and does not attract stamp duty. As to the charge to stamp duty see PARA 318; and STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1010 et seq.

4 See *Fain v Ayers* (1826) 2 Sim & St 533; *Re Jenkins and Commercial Electric Theatre Co's Contract* (1917) 61 Sol Jo 283. See also the Law of Property Act 1925 s 45(7) (see PARA 132 ante); and cf REAL PROPERTY vol 39(2) (Reissue) PARA 87.

5 See *ibid* s 72(3); and REAL PROPERTY vol 39(2) (Reissue) PARA 244.

6 See *ibid* s 64(1). It seems that at common law a person may contract in his representative capacity with himself as an individual: see *Rowley Holmes & Co v Barber* [1977] 1 All ER 801, [1977] 1 WLR 371, EAT, approving a statement now to be found in CONTRACT vol 9(1) (Reissue) PARA 604.

7 See the Law of Property Act 1925 s 82; *Rye v Rye* [1962] AC 496 at 512-514, [1962] 1 All ER 146 at 154-155, HL, per Lord Denning; and EQUITY vol 16(2) (Reissue) PARA 555. In practice the acknowledgment in such cases is made to the persons other than the grantor.

8 As to the necessity for, and form of, a certificate of value see STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1028.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(3) FORM OF ASSURANCE OF LEASEHOLDS/300. Recitals in assurance of leaseholds.

### **(3) FORM OF ASSURANCE OF LEASEHOLDS**

#### **300. Recitals in assurance of leaseholds.**

In an assignment of leaseholds<sup>1</sup> it is customary to recite the lease (defining it as 'the lease') and devolution of title to the vendor, but, where there have been numerous dealings with the property since the granting of the lease, the intermediate dealings are recited generally, and only the ultimate assurance to the vendor is particularly set out<sup>2</sup>. However, such narrative recitals should not be necessary where the title to the leasehold is already registered<sup>3</sup>. The recitals of the lease usually include a verbatim description of the parcels as in the lease, and in the operative part these are referred to as all the premises comprised in and demised by the lease.

1 As to the assignment of leases generally see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 547 et seq.

2 As to form of assurance of mortgaged leaseholds see *Re National Provincial and Union Bank of England and May's Contract* (1920) 150 LT Jo 262.

3 As to registration of title to leasehold land see LAND REGISTRATION vol 26 (2004 Reissue) PARAS 838-841.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(3) FORM OF ASSURANCE OF LEASEHOLDS/301. Covenants for title.

#### **301. Covenants for title.**

Covenants for title<sup>1</sup> may be implied by statute into an assignment on a sale of a leasehold property. Dispositions made on or after 1 July 1995 are governed by the new law<sup>2</sup>.

1 As to covenants for title see PARAS 336-351 post.

2 As to the reform of the law relating to statutory covenants for title see PARA 337 post; as to the old law see PARAS 338-348 post; and as to the new law relating to implied covenants for title see PARAS 349-351 post.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(3) FORM OF ASSURANCE OF LEASEHOLDS/302. Indemnity against covenants of lease.

### 302. Indemnity against covenants of lease.

Where the vendor as original lessee is liable for the payment of rent or the performance of the covenants under the lease, or is so liable as an assignee who has covenanted to indemnify his assignor in this respect, the purchaser used expressly to covenant for the future to pay the rent and perform and observe the lessee's covenants and to indemnify the vendor against this liability, but until 1 January 1996<sup>1</sup> it was the common practice to rely upon the statutory implied covenant to the like effect<sup>2</sup> in all cases where there is a valuable consideration for the purchase. However, where there is no such consideration, the statutory provision does not apply<sup>3</sup>. This may apply where the rent is a rackrent and the purchaser covenants to pay the rent and observe and perform the covenants, and this is stated to be the consideration for the assignment; but the usual practice in such cases is to include an express covenant.

From 1 January 1996, if a tenant assigns the whole of the premises demised to him under a tenancy, he is released from the tenant covenants of the tenancy and ceases to be entitled to the benefit of the landlord covenants of the tenancy, as from the assignment<sup>4</sup>, where on an assignment a tenant is to any extent released from a tenant covenant of a tenancy he may enter into an authorised guarantee agreement with respect to the performance of that covenant by the assignee<sup>5</sup>. Where the assignor is released from liability, no indemnity covenant is necessary.

1    le the date the Landlord and Tenant (Covenants) Act 1995 came into force: see s 31(1).

2    See the Law of Property Act 1925 s 77(1)(c), Sch 2 Pt IX (repealed); and the Land Registration Act 1925 s 24(1)(b) (repealed). These provisions are repealed except in relation to tenancies which are not new tenancies: see the Landlord and Tenant (Covenants) Act 1995 s 30(3)(a), (b). For the meaning of a 'new tenancy' see LAND REGISTRATION vol 26 (2004 Reissue) PARA 974. See also the Standard Conditions of Sale (3rd Edn), condition 4.5.4; and PARA 57 note 5 ante. As to the Standard Conditions of Sale see PARA 1 note 9 ante.

3    The Law of Property Act 1925 s 77(1)(c) (repealed) applies only to a transfer for valuable consideration; cf the Land Registration Act 1925 s 24 (repealed). As to the extent of the repeal of these provisions see note 2 supra.

4    See the Landlord and Tenant (Covenants) Act 1995 s 5(1), (2); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 582. As to the release from covenants on assignment of part only of the premises demised see s 5(3), (4); para 303 post; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 582.

5    See *ibid* s 16; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 593.

## UPDATE

### 302 Indemnity against covenants of lease

NOTES 4, 5--When consent to an assignment is sought, the landlord is only entitled to require an authorised guarantee agreement if it is reasonable to do so: *Wallis Fashion Group Ltd v CGU Life Assurance* (2001) 81 P & CR 393.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(3) FORM OF ASSURANCE OF LEASEHOLDS/303. Assignment of part of demised premises.

### 303. Assignment of part of demised premises.

In relation to tenancies which are not new tenancies<sup>1</sup>, where part only of the property demised by a lease is sold, the total rent is apportioned by the deed of assignment between the vendor and the purchaser, and both parties enter into mutual covenants for payment of their respective shares, and for performance of the lessee's covenants in the lease<sup>2</sup>. However, the assignee of part becomes liable to distress for the rent of the whole of the premises<sup>3</sup>. The transaction may also be carried out by way of underlease, in which case the purchaser incurs no liability under the covenants in the head lease<sup>4</sup>.

From 1 January 1996<sup>5</sup>, if the tenant assigns part only of the premises demised to him under a tenancy, then as from the assignment he is released from the tenant covenants of the tenancy, and ceases to be entitled to the benefit of the landlord covenants of the tenancy, only to the extent that those covenants fall to be complied with in relation to that part of the demised premises<sup>6</sup>.

1 For the meaning of a 'new tenancy' see LAND REGISTRATION vol 26 (2004 Reissue) PARA 974.

2 The express covenant can be omitted in reliance on the covenant implied under the Law of Property Act 1925 s 77(1)(d), Sch 2 Pt X (repealed); and the Land Registration Act 1925 s 24(2) (repealed). These provisions are repealed except in relation to tenancies which are not new tenancies: see the Landlord and Tenant (Covenants) Act 1995 s 30(3)(a), (b). There is now a procedure for making apportionment binding on the other party to a lease: see ss 9, 10; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 586, 587.

3 See LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 562.

4 See LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 108. A purchaser in such case is not normally liable to pay the vendor's costs: *Sims-Clarke v Ilet Ltd* [1953] IR 39.

5 The date the Landlord and Tenant (Covenants) Act 1995 came into force: see s 31(1).

6 See *ibid* s 5(1), (3); and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 582. See also PARA 302 ante.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(3) FORM OF ASSURANCE OF LEASEHOLDS/304. Sale in lots.

### **304. Sale in lots.**

When leasehold property comprised in one lease is sold in lots, the sale is usually effected by an assignment to the purchaser of the largest lot on trust to grant underleases to other purchasers<sup>1</sup>.

1 Fiduciary owners may sell in this way: *Re Judd and Poland and Skelcher's Contract* [1906] 1 Ch 684, CA; and see TRUSTS vol 48 (2007 Reissue) PARA 1042. See also *Re Braithwaite's Settled Estate* [1922] 1 IR 71 (sale in lots by tenant for life); and SETTLEMENTS vol 42 (Reissue) PARA 832 note 1.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(4) EXECUTION OF ASSURANCE/305. Execution by vendor.

## **(4) EXECUTION OF ASSURANCE**

### **305. Execution by vendor.**

When the draft transfer<sup>1</sup> prepared by the purchaser<sup>2</sup> has been approved by the vendor, the purchaser sends an engrossment to him for execution<sup>3</sup>. On a sale, the purchaser<sup>4</sup> is not entitled to require that the transfer to him be executed in his presence, or in that of his solicitor<sup>5</sup>; but he is entitled, at his own cost, to have the execution of the transfer attested by some person appointed by him, who may, if he thinks fit, be his solicitor<sup>6</sup>.

1 As to the client's right to drafts see LEGAL PROFESSIONS vol 65 (2008) PARA 758; and as to a conveyancer's lien on an uncompleted conveyance or transfer see *Esdaile v Oxenham* (1824) 3 B & C 225; *Oxenham v Esdaile* (1829) 3 Y & J 262; and LIEN vol 68 (2008) PARA 884. As to conveyancers see PARA 3 ante. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 As to the preparation of the transfer see PARAS 262-266 ante; and as to the expenses of preparing the transfer see PARA 129 ante.

3 As to the formalities necessary for the execution of deeds generally see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 27 et seq. As to the execution of deeds by individuals see the Law of Property (Miscellaneous Provisions) Act 1989 s 1 (as amended); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 7, 32-34. As to execution by corporations see the Law of Property Act 1925 s 74 (as amended); and AGENCY vol 1 (2008) PARA 45; CORPORATIONS vol 9(2) (2006 Reissue) PARAS 1262, 1265; DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 40 et seq. As to the rights of the purchaser as to execution see s 75; and the text and notes 4-6 infra. As to powers of attorney see the Powers of Attorney Act 1971; the Enduring Powers of Attorney Act 1985; paras 306-307 post; and AGENCY vol 1 (2008) PARAS 16-17, 45. The provisions as to the execution of a conveyance contained in the Law of Property Act 1925 (ie ss 74 (as amended), 75) apply, so far as applicable thereto, to transfers on sale of registered land: Land Registration Act 1925 s 38(1); and see LAND REGISTRATION.

As to the delivery of a deed as an escrow see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 37-39. The date properly to be inserted in a deed delivered as an escrow is the date on which the deed is delivered, not the date when the condition is fulfilled: *Alan Estates Ltd v WG Stores Ltd* [1982] Ch 511, [1981] 3 All ER 481, CA. It has also been held, however, that a deed is not 'executed' for the purposes of the Stamp Act 1891 s 14(4) (see CIVIL PROCEDURE vol 11 (2009) PARA 959; STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1007), until the condition has been fulfilled, and therefore that the rates of stamp duty prevailing at this later date, not the date of delivery in escrow, are applicable: *Terrapin International Ltd v IRC* [1976] 2 All ER 461, [1976] 1 WLR 665. As to delay in fulfilling the condition of the escrow see *Kingston v Ambrian Investment Co Ltd* [1975] 1 All ER 120, [1975] 1 WLR 161, CA; *Glessing v Green* [1975] 2 All ER 696, [1975] 1 WLR 863, CA.

4 For the meaning of 'purchaser' see PARA 55 note 16 ante.

5 See PARA 3 ante.

6 Law of Property Act 1925 s 75 (replacing the Conveyancing Act 1881 s 8 (repealed)); Land Registration Act 1925 s 38(1); and see note 3 supra. As to the former law see *Viney v Chaplin* (1858) 2 De G & J 468; *Essex v Daniell*, *Daniell v Essex* (1875) LR 10 CP 538. An alteration in a deed is presumed to have been made before execution: see *Re Spollon and Long's Contract* [1936] Ch 713, [1936] 2 All ER 711. Under an open contract the vendor cannot require the purchaser to accept a statutory declaration to contradict statements appearing in the documents of title: see *Re Spollon and Long's Contract* supra; and see PARA 97 note 1 ante. As to an open contract see PARA 76 ante.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(4) EXECUTION OF ASSURANCE/306. Execution in person or by attorney.

### **306. Execution in person or by attorney.**

A purchaser may require the transfer to be executed by the vendor and other necessary parties in person where this is practicable<sup>1</sup>. If the transfer cannot be executed otherwise than by attorney the purchaser need only ensure that the power endures beyond the date of actual completion, since, even if the power has been revoked, the purchaser will not be affected by the revocation unless he knew of it<sup>2</sup>. The power of attorney should be handed over on completion, or the right to production acknowledged<sup>3</sup>.



1 *Mitchel v Neale* (1755) 2 Ves Sen 679 at 681; *Noel v Weston* (1821) 6 Madd 50; Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 563; 1 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 513. In practice, when a deed has to be executed by attorney, the power of attorney is validated by statute (see note 2 infra; and PARA 307 post), and the former objection to such execution has been in consequence diminished. As to the court's power to make vesting orders or appoint persons to transfer see PARA 266 ante; and TRUSTS vol 48 (2007 Reissue) PARAS 835 et seq, 860-861, 865 et seq. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 See the Powers of Attorney Act 1971 s 5 (replacing the Law of Property Act 1925 ss 124, 126, 127 (repealed)); the Enduring Powers of Attorney Act 1985 ss 1(1)(c), 9(3); para 307 post; and AGENCY vol 1 (2008) PARA 193. As to acknowledgment of the right to production see PARA 299 ante; as to the revocation of an agency see AGENCY vol 1 (2008) PARA 170 et seq; as to the form of execution under a power of attorney see AGENCY vol 1 (2008) PARAS 45, 127; and as to the need for the power of attorney to be under seal see AGENCY vol 1 (2008) PARAS 15-16.

3 See *Eaton v Sanxter* (1834) 6 Sim 517 at 519. The requirements as to, and the provision for, filing a power of attorney in the Central Office of the Supreme Court have been abolished as from 1 October 1971: see the Powers of Attorney Act 1971 s 2(1) (repealed). However, a file of such instruments continues to be kept, and any person may search it, inspect any such instrument and receive an office copy, which is evidence of its contents: see the Supreme Court Act 1981 s 134; and AGENCY vol 1 (2008) PARA 17. As to proof of the contents of powers of attorney by means of copies see the Powers of Attorney Act 1971 s 3 (as amended); and AGENCY vol 1 (2008) PARA 17.

## UPDATE

### 306 Execution in person or by attorney

NOTE 3--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(4) EXECUTION OF ASSURANCE/307. Acts done under power of attorney.

### 307. Acts done under power of attorney.

Where a power of attorney<sup>1</sup> has been revoked and a person, without knowledge of the revocation, deals with the donee of the power, the transaction between them is, in favour of that person, as valid as if the power had then been in existence<sup>2</sup>. A person is deemed to know of the revocation of a power if he knows of any event (such as the death or incapacity of the donor) which would revoke the power<sup>3</sup>. Where the interest of a purchaser<sup>4</sup> depends on proof that a previous transaction between the donee of a power of attorney and a third person was valid on the ground that the third person had no knowledge of revocation, the requisite absence of knowledge is conclusively presumed if the third person's transaction was completed within 12 months of the date when the power came into operation, or if the third person makes a statutory declaration, before or within three months after the completion of the purchaser's transaction, that he did not at the material time know of the revocation of the power<sup>5</sup>.

Further, where a power of attorney is expressed to be irrevocable and is given to secure a proprietary interest of the donee of the power or the performance of an obligation owed to him, then, so long as the donee has that interest or the obligation remains undischarged, the power may not be revoked by the donor without the donee's consent, or by the death, incapacity or bankruptcy of the donor, or, where the donor is a body corporate, by its winding up or dissolution<sup>6</sup>. Where the power is expressed to be irrevocable and to be given by way of security, then unless the person dealing with the donee knows that it was not in fact given by way of security, he is entitled to assume that the power cannot be revoked except by the donor

acting with the donee's consent, and the dealing is valid unless he knows of revocation in that manner<sup>7</sup>.

Where an individual creates an enduring power of attorney while of sound mind it will not be revoked by his subsequent mental incapacity<sup>8</sup>. If such a power is registered with the Court of Protection, the purchaser is protected even if he knows of the donor's mental incapacity<sup>9</sup>. The attorney is authorised to execute or exercise all or any of the trusts, powers or discretions vested in the donor as trustee, including the power to give a valid receipt for capital or other money paid<sup>10</sup>. One of two trustees may appoint the other trustee to be the attorney<sup>11</sup>.

1 The limits of the power of attorney must be strictly observed: see AGENCY vol 1 (2008) PARAS 31-32. As to enduring powers of attorney generally see AGENCY vol 1 (2008) PARA 194 et seq.

2 Powers of Attorney Act 1971 s 5(2). Section 5 applies whenever the power of attorney was created, but only to acts and transactions in exercise of the power after 30 September 1971: s 5(7). See also the Enduring Powers of Attorney Act 1985 s 1(1)(c) (applying the Powers of Attorney Act 1971 s 5); and AGENCY vol 1 (2008) PARA 193.

3 See *ibid* s 5(5); and AGENCY vol 1 (2008) PARA 193.

4 For the meanings of 'purchaser' and 'purchase' see PARA 55 note 16 ante; definitions applied by the Powers of Attorney Act 1971 s 5(6); Enduring Powers of Attorney Act 1985 s 9(7).

5 See the Powers of Attorney Act 1971 s 5(4); and the Enduring Powers of Attorney Act 1985 s 9(4).

6 Powers of Attorney Act 1971 s 4(1); and see AGENCY vol 1 (2008) PARA 175. Section 4 applies to powers of attorney whenever created: s 4(3); and see *Sowman v David Samuel Trust Ltd* [1978] 1 All ER 616, [1978] 1 WLR 22.

7 Powers of Attorney Act 1971 s 5(3); and see AGENCY vol 1 (2008) PARA 193.

8 See the Enduring Powers of Attorney Act 1985 s 1(1)(a); and AGENCY vol 1 (2008) PARA 195. As to the characteristics of an enduring power of attorney see s 2; and AGENCY vol 1 (2008) PARA 196. The instrument which creates the power must be in the prescribed form: see s 2(1); and the Enduring Powers of Attorney (Prescribed Form) Regulations 1990, SI 1990/1376. As to the subsequent mental disorder of either contracting party see PARA 218 ante; and as to sales and purchases on behalf of mentally disordered persons generally see MENTAL HEALTH vol 30(2) (Reissue) PARA 671 et seq.

9 See the Enduring Powers of Attorney Act 1985 ss 4, 7 (as amended); and AGENCY vol 1 (2008) PARA 209.

10 See *ibid* s 3(3); and AGENCY.

11 This overcomes the difficulty revealed by *Walia v Michael Naughton Ltd* [1985] 3 All ER 673, [1985] 1 WLR 1115, but allows the attorney to give what is, in effect, a sole receipt for capital money.

## UPDATE

### 307 Acts done under power of attorney

NOTE 8--SI 1990/1376 amended: SI 2005/3116 (amended by SI 2007/548). See also the Enduring Powers of Attorney (Welsh Language Prescribed Form) Regulations 2005, SI 2005/3125 (amended by SI 2007/549).

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(4) EXECUTION OF ASSURANCE/308. Execution by the purchaser.

### 308. Execution by the purchaser.

A reservation of an easement for a legal estate, that is for an interest equivalent to an estate in fee simple in possession or a term of years absolute<sup>1</sup>, is effectual to give legal effect to the reservation without execution of the transfer by the purchaser<sup>2</sup>. However, if there are covenants by the purchaser, the transfer should be executed by him, even though a purchaser who has not executed the deed but who accepts the benefit of the deed becomes bound in equity to observe and perform the covenants<sup>3</sup>. A transfer of registered land need not be executed by a purchaser except where an entry is to be placed on the register in derogation of the estate passing to him<sup>4</sup>. Where a person fails to comply with a court order directing him to execute a transfer, the court may order the transfer to be executed by a nominee for that purpose<sup>5</sup>.

1 See the Law of Property Act 1925 s 1(2)(a); and REAL PROPERTY vol 39(2) (Reissue) PARA 45.

2 See *ibid* s 65(1); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 239. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

3 *Willson v Leonard* (1840) 3 Beav 373. See also PARA 333 post; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 64. Many practitioners, in the case of assignments of leaseholds where the implied covenant of indemnity was relied on, have refused to have the assignment executed by the purchaser. The statutory indemnity is now abolished in relation to leases granted after 1 January 1996, and, where necessary, an indemnity must be by express covenant: see PARAS 302-303 ante. It is thought that the better practice is, and always has been, for the purchaser to execute the assignment.

4 Eg where the sale is subject to restrictive covenants: see LAND REGISTRATION. As to a transfer being a deed poll see *Chelsea and Walham Green Building Society v Armstrong* [1951] Ch 853, [1951] 2 All ER 250; and as to restrictive covenants generally see EQUITY vol 16(2) (Reissue) PARA 613 et seq.

5 See PARA 266 ante; and CIVIL PROCEDURE.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(5) PURCHASE MONEY/(i) Receipt of Purchase Money/309. Form of receipt.

## **(5) PURCHASE MONEY**

### **(i) Receipt of Purchase Money**

#### **309. Form of receipt.**

The vendor must either himself give, or procure others to give, a valid receipt for the purchase money, and his inability to do so is a defect in the title<sup>1</sup>. In a deed executed after 31 December 1881<sup>2</sup>, a receipt in the body of a deed is a sufficient discharge to the person making the payment, without any further receipt being indorsed<sup>3</sup>. It is the practice to insert the receipt in the body of the deed immediately after the statement of the payment of the purchase money<sup>4</sup>.

A vendor is not bound to accept payment by cheque<sup>5</sup>.

1 *Forbes v Peacock* (1846) 1 Ph 717. On a sale by joint vendors, both should join in the receipt: see *Powell v Brodhurst* [1901] 2 Ch 160. As to repudiation by the purchaser for defect of title see PARA 239 ante; and as to the purchaser's action for damages see PARAS 256-258 ante.

2 Ie the date of the commencement of the Conveyancing Act 1881 was 1 January 1882: see s 1(2) (repealed).

3 See the Law of Property Act 1925 s 67 (replacing the Conveyancing Act 1881 s 54 (repealed)); and EQUITY vol 16(2) (Reissue) PARA 569.

4 An indorsed receipt is now practically unknown.

5 See *Clarke v King* (1826) 2 C & P 286; *Blumberg v Life Interests and Reversionary Securities Corp* [1897] 1 Ch 171 (affd [1898] 1 Ch 27, CA); *Johnston v Boyes* [1899] 2 Ch 73. The Standard Conditions of Sale (3rd Edn) require the purchaser to pay the money due on completion in one or more of the following ways: (1) legal tender; (2) a banker's draft (see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 896); (3) a direct credit to a bank account nominated by the vendor's solicitor; or (4) an unconditional release of a deposit held by a stakeholder: condition 6.7. As to the Standard Conditions of Sale see PARA 1 note 9 ante. See also PARA 315 note 6 post. As to the protection afforded to the vendor if he accepts a marked cheque see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 835, 847; and as to payment to a solicitor by cheque see PARA 315 post. The usual form of payment is now a banker's draft, but in the case of a substantial company such as an insurance company or a large building society, payment by cheque is often made and, in the absence of prior arrangement, is seldom objected to. Such a cheque given by a mortgagee who is financing the purchase marked 'not negotiable' raises no difficulty, but, if it is marked 'account payee only' and is made out in the name of the purchaser, difficulties would no doubt arise. See however, FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 895. Where a mortgagee is financing the purchase, the normal practice is for the mortgagee to send a cheque to the purchaser's solicitor prior to completion upon his giving the necessary undertaking. It is rare for a mortgagee to attend on completion, whether in person or by an agent. As to conveyancing services see PARA 3 ante.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(5) PURCHASE MONEY/(i) Receipt of Purchase Money/310. Evidence of receipt.

### 310. Evidence of receipt.

A receipt in the body of a deed executed after 1881<sup>1</sup>, or indorsed on it, is conclusive evidence of payment in favour of a subsequent purchaser not having notice of non-payment<sup>2</sup>. However, a subsequent purchaser cannot rely upon such receipt if he was unaware of its existence<sup>3</sup>. Absence of a receipt is presumptive evidence of non-payment of purchase money, and puts a subsequent purchaser upon inquiry as to whether it was paid<sup>4</sup>.

1 I.e. the date of the commencement of the Conveyancing Act 1881 was 1 January 1882: see s 1(2) (repealed).

2 See the Law of Property Act 1925 s 68 (replacing the Conveyancing Act 1881 s 55 (repealed)); and DEEDS AND OTHER INSTRUMENT vol 13 (2007 Reissue) PARA 224. A statement that the money has been paid is not a receipt within this provision: *Renner v Tolley* (1893) 68 LT 815. As to the form of a receipt see PARA 309 post; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 224. In the case of registered land, a receipt recorded in the proprietorship register would be sufficient for the purposes of the Law of Property Act 1925 s 68, but the entry of the price paid merely records the amount of the consideration and is not evidence of its payment: see *London and Cheshire Insurance Co Ltd v Laplagrene Property Co Ltd* [1971] Ch 499, [1971] 1 All ER 766.

3 *Lloyds Bank Ltd v Bullock* [1896] 2 Ch 192 at 195.

4 *Kennedy v Green* (1834) 3 My & K 699; *Greenslade v Dare* (1855) 20 Beav 284.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(5) PURCHASE MONEY/(i) Receipt of Purchase Money/311. Receipt by mortgagee.

### 311. Receipt by mortgagee.

The written receipt by a mortgagee is a sufficient discharge for any money arising under the statutory power of sale, and a person paying the same to the mortgagee is not concerned to inquire whether any money remains due on the mortgage<sup>1</sup>.

<sup>1</sup> See the Law of Property Act 1925 s 107(1) (reproducing the Conveyancing Act 1881 s 22(1) (repealed)); and MORTGAGE vol 77 (2010) PARA 468.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(5) PURCHASE MONEY/(i) Receipt of Purchase Money/312. Receipt by trustees.

### **312. Receipt by trustees.**

A written receipt by a trustee for money payable to him under any trust or power is a sufficient discharge, and exonerates the person making the payment from seeing to its application or being liable for its misapplication<sup>1</sup>. However, unless the trustee is a trust corporation, there must be two trustees to give a receipt for money arising under a trust of land or capital money arising under the Settled Land Act 1925<sup>2</sup>. All trustees who have not disclaimed or retired ought to join<sup>3</sup>. They may appoint a solicitor<sup>4</sup>, but not one of themselves, to receive the money<sup>5</sup>. Subject to the restriction on receipts by a sole trustee, a surviving trustee may exercise the powers of the trustees, and accordingly may give a receipt<sup>6</sup>.

A purchaser from a tenant for life selling under his statutory power<sup>7</sup> is discharged by the written receipt of the trustees of the settlement, or of a sole trustee where the trustee is a trust corporation, or of the personal representatives of the last surviving or continuing trustee<sup>8</sup>.

<sup>1</sup> See the Trustee Act 1925 s 14(1); and SETTLEMENTS vol 42 (Reissue) PARA 908.

<sup>2</sup> See the Settled Land Act 1925 s 94(1); the Law of Property Act 1925 s 27(2) (as substituted and amended) (see SETTLEMENTS vol 42 (Reissue) PARA 908); and the Trustee Act 1925 s 14(2) (as amended) (see TRUSTS vol 48 (2007 Reissue) PARA 1051). The reference to trustees applies to the surviving or continuing trustee or trustees for the time being: Settled Land Act 1925 s 94(2). A beneficiary under a trust for sale may obtain an injunction to restrain sale until the appointment of a second trustee: *Waller v Waller* [1967] 1 All ER 305, [1967] 1 WLR 451 (where it was also held that the position is no different where the property is the matrimonial home and the parties to the action are husband and wife). As to receipts by trustees see SETTLEMENTS vol 42 (Reissue) PARA 785; TRUSTS vol 48 (2007 Reissue) PARA 1051. See also PARA 71 note 5 ante.

<sup>3</sup> *Lee v Sankey* (1873) LR 15 Eq 204. See also *Hall v Franck* (1849) 11 Beav 519; *Locke v Lomas* (1852) 5 De G & Sm 326; *Hope v Liddell*, *Liddell v Norton* (1855) 21 Beav 183; *Re Fryer*, *Martindale v Picquot* (1857) 3 K & J 317; and TRUSTS vol 48 (2007 Reissue) PARAS 953, 1051.

<sup>4</sup> See the Trustee Act 1925 s 23(3)(a); para 315 post; and TRUSTS vol 48 (2007 Reissue) PARA 1000.

<sup>5</sup> *Re Flower and Metropolitan Board of Works* (1884) 27 ChD 592. Should there be any difficulty as to the trustees giving a receipt, it seems that the purchase money might be paid into court under the Trustee Act 1925 s 63 (as amended) (see TRUSTS vol 48 (2007 Reissue) PARA 917); see CPR Sch 1 RSC Ord 92 r 2 (as from 26 April 1999); *Cox v Cox* (1855) 1 K & J 251, (1855) 69 ER 451 (decided under RSC Ord 92 r 2); and CIVIL PROCEDURE. As to the CPR see PARA 133 note 1 ante. If the amount does not exceed the county court limit it may be paid into a county court: see the Trustee Act 1925 s 63A(3)(d) (as added) (see COURTS; TRUSTS vol 48 (2007 Reissue) PARA 642). The need for payment into court is not, however, likely to arise. As to the county court limit see s 63A(5) (as added); County Court Jurisdiction Order 1981, SI 1981/1123 (as amended); and COURTS.

<sup>6</sup> See the Trustee Act 1925 s 18(1); and POWERS; TRUSTS vol 48 (2007 Reissue) PARA 983. As to the powers of the personal representatives of a sole trustee or last surviving trustee see POWERS; TRUSTS vol 48 (2007 Reissue) PARAS 602, 754, 983.

<sup>7</sup> As to these powers see SETTLEMENTS vol 42 (Reissue) PARA 827 et seq.

<sup>8</sup> See the Settled Land Act 1925 s 95; and SETTLEMENTS vol 42 (Reissue) PARA 785.

## **UPDATE**

### **312 Receipt by trustees**

TEXT AND NOTE 2--The two-trustees rule is not satisfied by a receipt for money being given by a person (other than a trust corporation within the meaning of the Trustee Act 1925) who is acting either both as a trustee and as attorney for one or more other trustees, or as attorney for two or more trustees, and who is not acting together with any other person or persons: Trustee Delegation Act 1999 s 7(1), (2).

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(5) PURCHASE MONEY/(ii) Receipt of Purchase Money/313. Sale of superfluous land.

### **313. Sale of superfluous land.**

On a sale of superfluous land under the Lands Clauses Consolidation Act 1845, a receipt under the common seal of the promoters of the undertaking, if a corporation, or the hands of two of the directors or managers acting by the authority of the promoters, is a sufficient discharge for the purchase money<sup>1</sup>.

<sup>1</sup> Lands Clauses Consolidation Act 1845 s 131; and see COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 906.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(5) PURCHASE MONEY/(ii) Payment to Persons other than the Vendor/314. Payment to incumbrancers.

## **(ii) Payment to Persons other than the Vendor**

### **314. Payment to incumbrancers.**

Where the property is subject to incumbrances which are to be discharged out of the purchase money, the purchaser must pay the proper amounts to the incumbrancers and the balance to the vendor<sup>1</sup>. A purchaser who disregards an incumbrance of which he has knowledge, and pays the vendor without the incumbrancer's consent, is liable to the incumbrancer to the extent of such payment<sup>2</sup>.

<sup>1</sup> See Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 552; and 2 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 698-699. In practice the solicitor of one of the parties often appoints the solicitor of another as his agent to receive the money due to his client, except where the solicitors are all practising in or near the same town. In some cases an independent solicitor is appointed the agent of one of the parties to attend completion. In the case of some incumbrances, such as those in favour of friendly societies, receipts must be signed by trustees (see FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 2197), and such trustees must not give a receipt until they have actually received the money. In such cases the vendor's solicitor gives his undertaking to deliver an effectual discharge of the incumbrance within a stated time and the practice is to accept such an undertaking. As to conveyancing services see PARA 3 ante.

<sup>2</sup> See 2 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 698-699; *Rayne v Baker* (1859) 1 Giff 241; and *Tildesley v Lodge* (1857) 3 Sm & G 543. As to the equitable rights of a person who pays off a mortgage debt see MORTGAGE vol 77 (2010) PARAS 367, 383.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(5) PURCHASE MONEY/(ii) Payment to Persons other than the Vendor/315. Payment to solicitor or licensed conveyancers.

### **315. Payment to solicitor or licensed conveyancers.**

Where a solicitor<sup>1</sup> produces a deed having in the body of the deed or indorsed upon it a receipt for the consideration money or other consideration, and the deed has been executed, or the indorsed receipt signed, by the person entitled to give a receipt, the deed itself authorises payment being made to the solicitor without his producing any separate authority from the person who executed or signed the deed or receipt<sup>2</sup>. This procedure can be adopted by vendors who are trustees<sup>3</sup>.

The solicitor producing the deed must be acting for the party to whom the money is expressed to be paid<sup>4</sup>, but in the absence of suspicious circumstances the purchaser may assume that the solicitor is so acting<sup>5</sup>. The consideration must be paid in cash, payments by cheque to the statutory agent not being authorised<sup>6</sup>, nor is payment by set-off warranted<sup>7</sup>.

These provisions also apply to licensed conveyancers<sup>8</sup>.

Apart from these provisions as to solicitors and licensed conveyancers, payment should be made to the vendor's agent only when he produces a special authority to receive it<sup>9</sup>.

1 See PARA 3 ante.

2 See the Law of Property Act 1925 s 69(1) (reproducing the Conveyancing Act 1881 s 56 (repealed)); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 225; LEGAL PROFESSIONS vol 66 (2009) PARA 787. As to receipt of the purchase money see PARA 310 et seq ante.

3 See the Trustee Act 1925 s 23(3)(a); TRUSTS vol 48 (2007 Reissue) PARA 1000. As to receipts by trustees generally see PARA 312 ante; and TRUSTS vol 48 (2007 Reissue) PARA 1051.

4 *Day v Woolwich Equitable Building Society* (1888) 40 ChD 491 at 494. However, this was questioned in *King v Smith* [1900] 2 Ch 425 at 432.

5 *Re Hetling and Merton's Contract* [1893] 3 Ch 269, CA; *King v Smith* [1900] 2 Ch 425.

6 *Blumberg v Life Interests and Reversionary Securities Corp* [1897] 1 Ch 171 (affd [1898] 1 Ch 27, CA); *Johnston v Boyes* [1899] 2 Ch 73; and see AGENCY vol 1 (2008) PARA 38. As to payment to the vendor by cheque see PARA 309 note 5 ante.

7 *Coupe v Collyer* (1890) 62 LT 927. As to set-off generally see CIVIL PROCEDURE vol 11 (2009) PARA 634 et seq.

8 See the Administration of Justice Act 1985 s 34(1)(a); para 3 ante; and LEGAL PROFESSIONS vol 66 (2009) PARA 1411.

9 See AGENCY vol 1 (2008) PARAS 38, 133. Where the purchase is completed by the vendor's attorney acting under a power of attorney, the power will usually authorise payment of the purchase money to him, and, if it is valid for the purpose of transfer (see PARAS 306-307 ante), it is valid also for the purpose of payment.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(6) ENROLMENT ETC, STAMPS AND NOTICES/(i) Enrolment and Registration/316. Enrolment of transfer.

## **(6) ENROLMENT ETC, STAMPS AND NOTICES**

### **(i) Enrolment and Registration**

**316. Enrolment of transfer.**

There are still some exceptional cases where a transfer<sup>1</sup> of land is required to be enrolled. Certain transfers of land by ecclesiastical corporations for the purpose of enlarging a cemetery, churchyard or burying ground must be enrolled<sup>2</sup>. Upon a sale of land to or by the Duchy of Lancaster or of Cornwall, the assurance must be enrolled in the duchy office within six months of its execution<sup>3</sup>.

1 As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 See the Burial Ground Act 1816 s 1 (as amended); and CREMATION AND BURIAL. See also the Supreme Court Act 1981 s 133; and CIVIL PROCEDURE.

3 See CROWN PROPERTY vol 12(1) (Reissue) PARAS 316 (Duchy of Lancaster), 345 (Duchy of Cornwall). Acquisitions or dispositions of land by the Crown Estate Commissioners are no longer required to be enrolled: see CROWN PROPERTY vol 12(1) (Reissue) PARA 288.

**UPDATE****316 Enrolment of transfer**

NOTE 2--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(6) ENROLMENT ETC, STAMPS AND NOTICES/(i) Enrolment and Registration/317. Registration of title.

**317. Registration of title.**

A disposition of a registered estate in land is completed by the registration of the purchaser as proprietor of the estate, and until registration is effected the transferor is deemed to remain the proprietor<sup>1</sup>. Where the land is not already registered, most transactions with the freehold estate, or with a leasehold estate of more than 21 years, will give rise to first registration<sup>2</sup>.

1 See LAND REGISTRATION. An unregistered transfer may take effect in equity: see *Mascall v Mascall* (1984) 50 P & CR 119, [1984] LS Gaz R 2218, CA. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 See the Land Registration Act 1925 ss 123 (as substituted), 123A (as added); para 185 ante. As to compulsory registration see LAND REGISTRATION vol 26 (2004 Reissue) PARA 827 et seq.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(6) ENROLMENT ETC, STAMPS AND NOTICES/(ii) Stamps/318. Charge of stamp duty.

**(ii) Stamps****318. Charge of stamp duty.**



A transfer on sale is chargeable with ad valorem stamp duty at a rate varying according to the amount of the consideration, although where the consideration is under a specified amount and the transfer contains a certificate of value, no duty is payable<sup>1</sup>. The amounts of the exemption and the appropriate rates of duty are dealt with elsewhere in this work<sup>2</sup>. On a transfer on sale of the fee simple of land or of a lease for a term of seven years or more, it is normally the duty of the purchaser to produce to the Commissioners of Inland Revenue the instrument by which the transfer is effected, and, if he fails to do so, he is liable to a fine<sup>3</sup>. For the purposes of stamp duty, a deed delivered in escrow is not fully executed until the condition is fulfilled, and the applicable rate of duty is the rate prevailing at that later date<sup>4</sup>.

1 See the Stamp Act 1891 s 1, Sch 1 Conveyance or Transfer on Sale (as amended); Finance Act 1963 s 55(1) (as amended); and STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1027 et seq. As to partition or division see the Stamp Act 1891 s 73 (as amended) (see STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1080); and cf *IRC v Littlewoods Mail Order Stores Ltd* [1963] AC 135, [1962] 2 All ER 279, HL. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 See STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARAS 1027 et seq, 1082 et seq.

3 See the Finance Act 1931 s 28 (as amended), Sch 2 (as substituted); and STAMP DUTIES AND STAMP DUTY RESERVE TAX vol 44(1) (Reissue) PARA 1026.

4 *Terrapin International Ltd v IRC* [1976] 2 All ER 461, [1976] 1 WLR 665. See also PARA 305 note 3 ante.

## UPDATE

### 318 Charge of stamp duty

NOTE 1--Stamp Act 1891 ss 1, 73, Sch 1 repealed: Finance Act 1999 Sch 19 para 1, Sch 20 Pt V(2).

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(6) ENROLMENT ETC, STAMPS AND NOTICES/(ii) Stamps/319. Inadmissibility in evidence of unstamped documents.

### 319. Inadmissibility in evidence of unstamped documents.

A document requiring a stamp cannot be admitted in evidence in legal proceedings unless it is duly stamped or payment of the duty and certain further sums is made or an undertaking to pay is given<sup>1</sup>. The proper stamping of documents of title is an important matter of title because, if the owner of the property is called upon to defend his right or to attack a wrongdoer with regard to the property, he must produce his documents of title in evidence and this he cannot do so long as the requirements for the admission of any deed have not been complied with<sup>2</sup>.

1 See PARA 97 ante; and CIVIL PROCEDURE vol 11 (2009) PARA 749.

2 *Re Spollon and Long's Contract* [1936] Ch 713 at 718, [1936] 2 All ER 711 at 717 per Luxmoore J.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(6) ENROLMENT ETC, STAMPS AND NOTICES/(iii) Notices/320. Notices on purchase of equitable estate.

### (iii) Notices

#### 320. Notices on purchase of equitable estate.

Before 1926 on the purchase of an equitable interest in land (other than an interest in the proceeds of sale under a trust for sale), the priority of a purchaser did not depend on his giving notice of his purchase to the trustees, mortgagees or other persons in whom the legal estate was vested<sup>1</sup>. The rule<sup>2</sup>, which regulates the priorities of assignees and incumbrancers of things in action by the order in which notice is given to the trustees, has since 1925 applied to dealings with equitable interests in land<sup>3</sup>, and accordingly a purchaser of an equitable interest in land should give notice to the appropriate person<sup>4</sup>. In the case of a dealing with an equitable interest in settled land the appropriate persons are the trustees of the settlement<sup>5</sup>; in the case of a dealing with an equitable interest in land subject to a trust of land, or the proceeds of the sale of such land, the persons to be served with notice are the trustees<sup>6</sup>; and in any other case the appropriate person is the estate owner of the land affected<sup>7</sup>.

1 The doctrine of notice, applicable to equitable interests in trust funds and to choses in action, did not apply to land: see CHOSSES IN ACTION vol 13 (2009) PARA 45 et seq; EQUITY vol 16(2) (Reissue) PARA 568. Where title deeds are retained by the vendor, notice of the transfer to the purchaser should, by agreement, be indorsed on one of the principal deeds, although in the absence of agreement the purchaser cannot insist on this: see 1 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 591. The purchaser can, however, insist on notice of covenants in the transfer to him restricting the use of land retained by the vendor being indorsed upon or annexed to one of the common title deeds: see the Law of Property Act 1925 s 200(1); and PARA 298 ante. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 The rule in *Dearle v Hall* (1828) 3 Russ 1: see CHOSSES IN ACTION vol 13 (2009) PARA 41 et seq.

3 See the Law of Property Act 1925 s 137(1); and CHOSSES IN ACTION vol 13 (2009) PARA 45.

4 See *ibid* s 137(2) (as amended); and CHOSSES IN ACTION vol 13 (2009) PARA 50.

5 See *ibid* s 137(2)(i). As to the notice required to be given to the trustees of the settlement by a tenant for life intending to make a sale see SETTLEMENTS vol 42 (Reissue) PARA 783.

6 *Ibid* s 137(2)(ii) (amended by the Trusts of Land and Appointment of Trustees Act 1996 s 25(1), Sch 3 para 4(1), (15)(a)). For the meaning of 'trust of land' see REAL PROPERTY vol 39(2) (Reissue) PARA 207.

7 Law of Property Act 1925 s 137(2)(iii). The estate owner is, as to freehold land, the person who is seised in fee simple absolute, and, as to leasehold land, the person in whom the term of years absolute is vested: see s 1(1), (4); and REAL PROPERTY vol 39(2) (Reissue) PARAS 45, 47.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(6) ENROLMENT ETC, STAMPS AND NOTICES/(iii) Notices/321. Notice on purchase of equity of redemption.

#### 321. Notice on purchase of equity of redemption.

On the purchase of an equity of redemption in land the purchaser should inquire of the mortgagee as to the amount due to him on the mortgage, and should give him notice of the transfer of the equity. This will prevent the mortgagee from tacking a subsequent advance to the original mortgage, unless that mortgage imposed on him an obligation to make further advances<sup>1</sup>.

1 As to the doctrine of tacking see MORTGAGE vol 77 (2010) PARAS 264, 265; as to the risks to a purchaser of an equity of redemption arising from the doctrine of the consolidation of mortgages see MORTGAGE vol 77 (2010)

PARA 302 et seq; and as to the notice required to be given by a mortgagee before exercising his statutory power of sale see MORTGAGE vol 77 (2010) PARAS 453-455.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(6) ENROLMENT ETC, STAMPS AND NOTICES/(iii) Notices/322. Effect of death of intended recipient of notice.

### **322. Effect of death of intended recipient of notice.**

Service of a notice affecting land<sup>1</sup> which would be effective but for the death of the intended recipient is effective despite his death if the person serving the notice has no reason to believe that he has died<sup>2</sup>. Where the person serving a notice affecting land has no reason to believe that the intended recipient has died, the proper address for the service of documents by post<sup>3</sup> is what would be the proper address apart from his death<sup>4</sup>. The above provisions do not apply to a notice authorised or required to be served for the purposes of proceedings before<sup>5</sup> (1) any court<sup>6</sup>; (2) specified tribunals<sup>7</sup>; or (3) the Chief Land Registrar or any district registrar or any assistant district registrar<sup>8</sup>; but this is without prejudice to the power to make provision in relation to such proceedings by rules of court, procedural rules within the meaning of the Tribunals and Inquiries Act 1992<sup>9</sup>, or rules under the Land Registration Act 1925<sup>10</sup>.

A notice affecting land which would have been authorised or required to be served on a person but for his death is sufficiently served before a grant of representation has been filed if<sup>11</sup>: (a) it is addressed to 'The Personal Representative of' the deceased (naming him) and left at or sent by post to his last known place of residence or business in the United Kingdom<sup>12</sup>; and (b) a copy of it, similarly addressed, is served on the Public Trustee<sup>13</sup>. This method of service is not available where provision is made (i) by or under any enactment; or (ii) by an agreement in writing, requiring a different method of service, or expressly prohibiting this method of service, in the circumstances<sup>14</sup>.

1 'Land' includes buildings and other structures, land covered with water, and any estate, interest, easement, servitude or right over land: Interpretation Act 1978 s 5, Sch 1.

2 Law of Property (Miscellaneous Provisions) Act 1994 s 17(1).

3 Ie under the Interpretation Act 1978 s 7 (see STATUTES vol 44(1) (Reissue) PARAS 1388, 1390): see the Law of Property (Miscellaneous Provisions) Act 1994 s 17(2).

4 Ibid s 17(2).

5 Ibid s 17(3).

6 Ibid s 17(3)(a).

7 Ibid s 17(3)(b). The tribunals are those specified in the Tribunals and Inquiries Act 1992 s 1, Sch 1 (as amended) (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 57): see the Law of Property (Miscellaneous Provisions) Act 1994 s 17(3)(b).

8 Ibid s 17(3)(c).

9 Ie the Tribunals and Inquiries Act 1992 s 8 (as amended) (see ADMINISTRATIVE LAW vol 1(1) (2001 Reissue) PARA 56): see the Law of Property (Miscellaneous Provisions) Act 1994 s 17(3).

10 Ie the Land Registration Act 1925 s 144: see the Law of Property (Miscellaneous Provisions) Act 1994 s 17(3).

11 Ibid 18(1). The reference to the filing of a grant of representation is to the filing at the Principal Registry of the Family Division of the High Court of a copy of a grant of representation in respect of the deceased's estate or, as the case may be, the part of his estate which includes the land in question: s 18(2). As to the filing

of documents served on the Public Trustee, the keeping of a register of details taken from them, and searches of the register see the Public Trustee (Notices Affecting Land) (Title on Death) Regulations 1995, SI 1995/1330; and TRUSTS vol 48 (2007 Reissue) PARA 767.

12 Law of Property (Miscellaneous Provisions) Act 1994 s 18(1)(a). 'United Kingdom' means Great Britain and Northern Ireland: Interpretation Act 1978 Sch 1. 'Great Britain' means England, Scotland and Wales: Union with Scotland Act 1706, preamble art I; Interpretation Act 1978 s 22(1), Sch 2 para 5(a). Neither the Channel Islands nor the Isle of Man are within the United Kingdom. See further CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 3.

13 Law of Property (Miscellaneous Provisions) Act 1994 s 18(1)(b). As to the fees payable in respect of the function of the Public Trustee see the Public Trustee (Fees) Order 1985, SI 1985/373, art 29A (as added); and TRUSTS vol 48 (2007 Reissue) PARA 791; and as to the establishment of the office of the Public Trustee see the Public Trustee Act 1906 s 1; and TRUSTS vol 48 (2007 Reissue) PARA 766.

14 Law of Property (Miscellaneous Provisions) Act 1994 s 18(3).

## UPDATE

### 322 Effect of death of intended recipient of notice

TEXT AND NOTE 7--1994 Act s 17(3)(b) substituted: Tribunals, Courts and Enforcement Act 2007 Sch 8 para 33(2).

TEXT AND NOTE 8--Head (3) now the Chief Land Registrar or the Adjudicator to Her Majesty's Land Registry: Law of Property (Miscellaneous Provisions) Act 1994 s 17(3) (amended by the Land Registration Act 2002 Sch 11 para 31(3)).

TEXT AND NOTE 10--Reference is now to the Land Registration Act 2002: Law of Property (Miscellaneous Provisions) Act 1994 s 17(3) (amended by the Land Registration Act 2002 Sch 11 para 31(3)).

NOTE 11--SI 1995/1330 amended by SI 2001/3902.

NOTE 13--SI 1985/373 art 29A now the Public Trustees (Fees) Order 2008, SI 2008/611, art 29.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(7) COSTS/323. Costs payable by the purchaser.

## (7) COSTS

### 323. Costs payable by the purchaser.

In the absence of express stipulation, the purchaser pays the costs of preparing the transfer<sup>1</sup>. Where, however, a sale was carried out by the grant of an underlease, the underlessor was held not entitled to the costs of preparing the underlease<sup>2</sup>. The purchaser pays the costs of registration of a transfer under the Land Registration Act 1925<sup>3</sup>; of an acknowledgment of the right of production of deeds or covenant for production, other than the costs of perusal and execution on behalf of and by the vendor and other necessary parties<sup>4</sup>; and the expense of procuring attested copies of documents retained by the vendor<sup>5</sup>.

1 *Poole v Hill* (1840) 6 M & W 835; and see PARA 262 ante. As to the costs of making and verifying the abstract, producing deeds not in the vendor's possession etc see PARAS 170-173 ante. As to the need for an abstract of title with respect to both unregistered and registered land see PARAS 138, 141-149 ante. As to the costs of stamping unstamped or insufficiently stamped deeds see PARA 97 ante; and as to solicitors' costs see LEGAL PROFESSIONS vol 66 (2009) PARA 931 et seq.

2 *Sims-Clarke v Ilet Ltd* [1953] IR 39.

3 See PARA 265 ante. As to land registration fees generally see LAND REGISTRATION vol 26 (2004 Reissue) PARA 1071 et seq. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

4 See the Law of Property Act 1925 s 45(8).

5 See ibid s 45(4); and PARA 132 ante.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(7) COSTS/324. Costs payable by the vendor.

### **324. Costs payable by the vendor.**

The expense of the perusal and execution of the transfer by all necessary transferring parties<sup>1</sup>, of registration of a vendor's title under the Land Registration Act 1925 or of procuring a transfer from the registered proprietor to the purchaser<sup>2</sup> is borne by the vendor, who also pays the expense of discharging incumbrances or getting in outstanding estates<sup>3</sup>, or the additional expense occasioned by the incumbrancers, or persons in whom estates are vested, being joined in the transfer<sup>4</sup>.

1 Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 561. See also PARA 276 ante. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 See the Land Registration Act 1925 s 110(5); *Urban Manor Ltd v Sadiq* [1997] 1 WLR 1016, [1997] 12 LS Gaz R 22, CA; and LAND REGISTRATION.

3 *Esdaile v Oxenham* (1824) 3 B & C 225 at 228-229; *Re Sander and Walford's Contract* (1900) 83 LT 316. Stipulation to the contrary cannot now be made: see PARA 129 ante.

4 See *Jones v Lewis* (1847) 1 De G & Sm 245; Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 555; and 1 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 593. Cf *Reeves v Gill* (1838) 1 Beav 375.

## **UPDATE**

### **324 Costs payable by the vendor**

NOTE 2--Land Registration Act 1925 repealed and replaced by the Land Registration Act 2002; see LAND REGISTRATION.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/3. COMPLETION/(7) COSTS/325. Costs of transfer on compulsory purchase.

### **325. Costs of transfer on compulsory purchase.**

In the case of land purchased under the Lands Clauses Consolidation Act 1845 or the Compulsory Purchase Act 1965, whether compulsorily or by agreement, the vendor's and purchaser's costs of transfer, including getting in outstanding legal estates, terms and interests, and deducing and verifying the title, are paid by the promoters or the acquiring authority<sup>1</sup>.

1 See the Lands Clauses Consolidation Act 1845 s 82; the Compulsory Purchase Act 1965 s 23(1); and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 659. Preliminary expenses and other costs not covered by statute are usually made the subject of express stipulation on sales by agreement.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/4. POSITION OF THE PARTIES AFTER COMPLETION/(1) BENEFITS ENJOYED WITH THE PROPERTY SOLD/(i) Rents and Profits/326. Purchaser's rights after completion.

#### **4. POSITION OF THE PARTIES AFTER COMPLETION**

##### **(1) BENEFITS ENJOYED WITH THE PROPERTY SOLD**

###### **(i) Rents and Profits**

###### **326. Purchaser's rights after completion.**

After completion of the purchase by payment of the purchase money<sup>1</sup> and transfer of the property, the purchaser becomes entitled to exercise, in place of the vendor, all such rights of ownership as are incident to the estate transferred, subject, however, to any reservations and liabilities to which it was subject before completion or which are created by the transfer<sup>2</sup>.

1 As to the vendor's lien for purchase money when it is not paid on completion see PARAS 183, 187 ante; and LIEN vol 68 (2008) PARA 859 et seq. As to completion see PARAS 262-325 ante.

2 As to the rights of an owner in fee simple see REAL PROPERTY vol 39(2) (Reissue) PARA 94 et seq. As to leaseholds see REAL PROPERTY vol 39(2) (Reissue) PARA 100 et seq. As to the reservation of easements in the transfer see PARA 308 ante. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/4. POSITION OF THE PARTIES AFTER COMPLETION/(1) BENEFITS ENJOYED WITH THE PROPERTY SOLD/(i) Rents and Profits/327. Purchaser's rights against a tenant.

###### **327. Purchaser's rights against a tenant.**

If the land sold is in the occupation of a tenant, attornment by the tenant is not necessary to give effect to the transfer of the reversion<sup>1</sup>, but notice of the transfer should be given to him in order to prevent any further payment of rent to the vendor<sup>2</sup>. The purchaser, as owner of the reversion, can, in the case of a lease granted before 1 January 1996<sup>3</sup>, recover by distress rent which is in arrear at the date of the transfer or which accrues due thereafter<sup>4</sup>, and he can sue on the covenant or agreement for payment of rent<sup>5</sup>. In the case of a lease granted on or after 1 January 1996, only rent accruing due after the date of the transfer is recoverable by the purchaser<sup>6</sup>. However, the benefit of a court order for possession made in favour of a landlord against a tenant does not pass merely by transfer of the landlord's estate in the land<sup>7</sup>.

1 See the Law of Property Act 1925 s 151(1)(a). As to attornment see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 3. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 Such payment does not prejudice the tenant before he has received notice of the assignment of the reversion: see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 3, 262.

3     le the date on which the Landlord and Tenant (Covenants) Act 1995 came into force: see the Landlord and Tenant (Covenants) Act 1995 (Commencement) Order 1995, SI 1995/2963.

4     See DISTRESS vol 13 (2007 Reissue) PARA 968. As to the reservation of rent, and the running of rent with the reversion see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 242 et seq, 570.

5     See the Law of Property Act 1925 s 141; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 567. As to the enforcement of covenants in a lease on the assignment of the reversion generally see PARA 334 post. An assignee of the reversion on a lease created before 1 January 1996 may sue for rent due and breaches of covenant committed before the assignment (see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 570); otherwise where the lease is created on or after 1 January 1996 (see the Landlord and Tenant (Covenants) Act 1995 s 23(1)). As to estoppel between the assignee of the reversion and the tenant see ESTOPPEL vol 16(2) (Reissue) PARA 1036.

6     See *ibid* s 23(1). However, the existing rent arrears, though not owed to the purchaser, may still enable the purchaser to forfeit the lease: see *Kataria v Safeland plc* [1998] 05 EG 155, 75 P & CR D30, CA.

7     *Chung Kwok Hotel Co Ltd v Field* [1960] 3 All ER 143, [1960] 1 WLR 1112, CA, where it was expressly left undecided whether the benefit of the order could be expressly assigned. As to actions for possession generally see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 656 et seq.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/4. POSITION OF THE PARTIES AFTER COMPLETION/(1) BENEFITS ENJOYED WITH THE PROPERTY SOLD/(i) Rents and Profits/328. Apportionment of rent.

### **328. Apportionment of rent.**

Where the property sold is only part of the demised premises, the transfer effects a severance of the reversion, and the rent can be apportioned between the part transferred to the purchaser and the remainder of the premises<sup>1</sup>. Usually, on a sale by auction, the particulars show how the rent is to be apportioned and make the apportionment binding between vendor and purchaser; but in order that the apportionment may be binding on the tenant it should be made with his consent or by judicial process<sup>2</sup>.

1     As to the apportionment of rent see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 278 et seq. Under the Law of Property Act 1925 s 141(1), rent goes with the reversionary estate in the land notwithstanding severance of that estate: see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 555. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2     See *Walter v Maunde* (1820) 1 Jac & W 181; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 555. See also PARAS 124, 193 ante. As to the effect of particular conditions of sale see PARA 84 et seq ante.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/4. POSITION OF THE PARTIES AFTER COMPLETION/(1) BENEFITS ENJOYED WITH THE PROPERTY SOLD/(i) Rents and Profits/329. Notice of tenant's interest.

### **329. Notice of tenant's interest.**

From the fact of the tenant's occupation, the purchaser has notice of his interest whatever it may be<sup>1</sup>, and he takes, accordingly, subject to the tenant's rights, including not only those which arise out of the tenancy<sup>2</sup>, but also those to which the tenant is entitled under any collateral or subsequent agreement, such as an agreement for purchase<sup>3</sup>, and he must give effect to such rights<sup>4</sup>. However, a purchaser of unregistered land who does not inquire whether a tenant may have a right to rectification of his lease or tenancy agreement is not bound by

any right to rectification which the tenant has, since the purchaser is entitled to assume that a tenancy agreement correctly states the relationship between landlord and tenant<sup>5</sup>. In the case of registered land, a right of rectification belonging to a tenant who is in actual occupation, or in receipt of the rents and profits, constitutes an overriding interest, unless on inquiry the right is not disclosed<sup>6</sup>.

1 *Daniels v Davison* (1811) 17 Ves 433; *Meux v Maltby* (1818) 2 Swan 277 at 281; *Lewis v Stephenson* (1898) 67 LJQB 296. See also *Clements v Conroy* [1911] 2 IR 500 at 508, Ir CA; *Poster v Slough Estates Ltd* [1969] 1 Ch 495 at 506, [1968] 3 All ER 257 at 261; and EQUITY vol 16(2) (Reissue) PARA 582. As to inquiries of the tenant see PARA 6 ante.

2 *Taylor v Stibbert* (1794) 2 Ves 437.

3 *Daniels v Davison* (1809) 16 Ves 249 at 254. This, however, has been described as an extreme case: *Jones v Smith* (1841) 1 Hare 43 at 62; affd (1843) 1 Ph 244. See also *Allen v Anthony* (1816) 1 Mer 282 (agreement for sale of timber). To be effective against a purchaser, an agreement or option to purchase must be registered as an estate contract: see LAND CHARGES vol 26 (2004 Reissue) PARA 632; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 135. As to the benefit of the option passing on assignment see *Griffith v Pelton* [1958] Ch 205, [1957] 3 All ER 75, CA; *Re Button's Lease, Inman v Button* [1964] Ch 263, [1963] 3 All ER 708. See also PARA 27 ante.

4 *Barnhart v Greenshields* (1853) 9 Moo PCC 18 at 32; *Bailey v Richardson* (1852) 9 Hare 734; *Carroll v Keayes, Keayes v Carroll* (1873) IR 8 Eq 97, Ir CA. Possession is prima facie evidence of seisin in fee, and hence the fact of occupation is notice of the possibility of an estate in fee simple: *Jones v Smith* (1841) 1 Hare 43 at 60.

5 *Smith v Jones* [1954] 2 All ER 823, [1954] 1 WLR 1089. This rule does not apply if the purchaser is given notice of the tenant's claim or of facts showing that there is a right of rectification: see *Blacklocks v JB Developments (Godalming) Ltd* [1982] Ch 183 at 195-196, [1981] 3 All ER 392 at 400-401.

6 See the Land Registration Act 1925 s 70(1)(g). See also *Blacklocks v JB Developments Ltd* [1982] Ch 183, [1981] 3 All ER 392. Where the vendor has provided the purchaser with copies of the documents embodying the lease terms, the purchaser is treated as entering into the contract knowing and fully accepting those terms (see the Standard Conditions of Sale (3rd Edn), condition 8.1.2; and PARA 98 ante); but that provision obviously applies only between vendor and purchaser. As to the Standard Conditions of Sale see PARA 1 note 9 ante.

## UPDATE

### 329 Notice of tenant's interest

NOTE 6--Land Registration Act 1925 repealed and replaced by the Land Registration Act 2002; see LAND REGISTRATION.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/4. POSITION OF THE PARTIES AFTER COMPLETION/(1) BENEFITS ENJOYED WITH THE PROPERTY SOLD/(i) Rents and Profits/330. Notice of adverse claims.

### 330. Notice of adverse claims.

If the tenant has been paying rent to a person claiming adversely to the vendor, the fact of the tenancy, without actual notice of the adverse claim, is not notice of the title of the adverse claimant<sup>1</sup>. The purchaser is, as between himself and the adverse claimant, not bound to inquire to whom rent has been paid<sup>2</sup>. If, however, the purchaser makes the inquiry and finds that rent is being paid to an adverse claimant, this gives the purchaser notice of his rights<sup>3</sup>, although, for this purpose, notice is not imputed from the circumstance that the rents are being paid to an estate agent<sup>4</sup>.



The general statutory provisions relating to legal estates, equitable interests and powers<sup>5</sup> do not prejudicially affect the interest of any person in possession<sup>6</sup> or in actual occupation of land to which he may be entitled in right of such possession or occupation<sup>7</sup>. However, the overreaching powers contained in those provisions operate even though the purchaser has failed to make the usual inquiries of the tenant or other person in occupation<sup>8</sup>.

1 *Barnhart v Greenshields* (1853) 9 Moo PCC 18 at 34; *Hunt v Luck* [1902] 1 Ch 428 at 432, CA, overruling the dictum to the contrary in *Mumford v Stohwasser* (1874) LR 18 Eq 556 at 562. See also EQUITY vol 16(2) (Reissue) PARA 582. Cf, however, the Law of Property Act 1925 s 14 (see the text and note 7 infra); and the Land Registration Act 1925 s 70(1)(g).

2 If, however, the purchaser knows that the rents are being paid to a person other than the vendor, as trustee, he must inquire for whom the trustee receives them: *Knight v Bowyer* (1858) 2 De G & J 421.

3 *Bailey v Richardson* (1852) 9 Hare 734; *Barnhart v Greenshields* (1853) 9 Moo PCC 18; *Hunt v Luck* [1902] 1 Ch 428 at 433, CA.

4 *Hunt v Luck* [1902] 1 Ch 428, CA.

5 See the Law of Property Act 1925 Pt I (ss 1-39) (as amended); see REAL PROPERTY vol 39(2) (Reissue) PARA 91 et seq.

6 'Possession' includes the receipt of rents and profits or the right to receive the same, if any: *ibid* s 205(1) (xix).

7 *Ibid* s 14.

8 See *ibid* s 2 (as amended); paras 271-272 ante; and REAL PROPERTY vol 39(2) (Reissue) PARA 247 et seq. See also *City of London Building Society v Flegg* [1988] AC 54, [1987] 3 All ER 435, HL, distinguishing *Williams and Glyn's Bank Ltd v Boland* [1981] AC 487, [1980] 2 All ER 408, HL. As to the effect of the Trusts of Land and Appointment of Trustees Act 1996 s 16 on purchasers of registered land see TRUSTS vol 48 (2007 Reissue) PARAS 1035-1036, 1046.

## UPDATE

### 330 Notice of adverse claims

NOTE 1--Land Registration Act 1925 repealed and replaced by the Land Registration Act 2002; see LAND REGISTRATION.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/4. POSITION OF THE PARTIES AFTER COMPLETION/(1) BENEFITS ENJOYED WITH THE PROPERTY SOLD/(ii) Right to Benefit of Covenants running with the Land/331. Covenants running with the land.

## (ii) Right to Benefit of Covenants running with the Land

### 331. Covenants running with the land.

Upon the sale of land the purchaser is frequently required to enter into covenants, either positive or negative, affecting the enjoyment of the land, or of neighbouring premises. For example, a covenant to lay out money in maintaining roads is a positive covenant of this character, and a covenant not to use premises as a shop is a negative or restrictive covenant. These covenants are binding as between the covenantor and covenantee as the immediate contracting parties. However, the covenants may also be enforceable by the vendor and his successors in title against the purchaser and his successors in title by virtue of their ownership

of land, and the benefit and the burden are then said to run with the land, the land being either at the time of sale, or prior to it, land of the vendor, or the land transferred to the purchaser.

The benefit of a covenant may run with the land at law or in equity<sup>1</sup>. In the case of a lease granted before 1 January 1996<sup>2</sup>, the burden of covenants between landlord and tenant which touch and concern the demised land will pass on an assignment of the lease<sup>3</sup> or the reversion<sup>4</sup>. Where the lease is granted on or after that date, the requirement that the covenants touch and concern the demised land is abolished, but there is an exclusion for covenants which, in whatever terms, are expressed to be personal to any person<sup>5</sup>. The burden of a covenant between vendor and purchaser does not run at law<sup>6</sup>, but will run in equity where the covenants are restrictive<sup>7</sup>. Where the benefit of a restrictive covenant does not run with the land because it has not been annexed to that land, the benefit may be assignable<sup>8</sup>.

1 The transmission of the benefit of leasehold covenants depends partly on the common law principle of privity of estate (on the assignment of the lease) (see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 566), and partly on statute, ie on the Law of Property Act 1925 s 141 (on the assignment of the reversion) (see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 567).

2 Ie the date on which the Landlord and Tenant (Covenants) Act 1995 came into force: see the Landlord and Tenant (Covenants) Act 1995 (Commencement) Order 1995, SI 1995/2963.

3 Ie on the principle of privity of estate: see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 554 et seq.

4 See the Law of Property Act 1925 s 142; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 571.

5 See the Landlord and Tenant (Covenants) Act 1995 s 3; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 580.

6 See PARA 333 post; and EQUITY vol 16(2) (Reissue) PARA 613.

7 See PARA 333 post; and EQUITY vol 16(2) (Reissue) PARA 615 et seq. As to the need for registration see EQUITY vol 16(2) (Reissue) PARA 620; LAND CHARGES vol 26 (2004 Reissue) PARA 635.

8 See EQUITY vol 16(2) (Reissue) PARA 623; but see *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 All ER 371, [1980] 1 WLR 594, CA; *Roake v Chadha* [1983] 3 All ER 503, [1984] 1 WLR 40; *J Sainsbury plc v Enfield London Borough Council* [1989] 2 All ER 817, [1989] 1 WLR 590. As to the imposition of restrictive covenants under a scheme of development see EQUITY vol 16(2) (Reissue) PARAS 617, 624-626.

## UPDATE

### 331 Covenants running with the land

NOTES--See *University of East London Higher Education Corpn v Barking and Dagenham LBC* [2004] EWHC 2710 (Ch), [2005] 3 All ER 398.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/4. POSITION OF THE PARTIES AFTER COMPLETION/(1) BENEFITS ENJOYED WITH THE PROPERTY SOLD/(ii) Right to Benefit of Covenants running with the Land/332. Circumstances in which benefit will run.

### 332. Circumstances in which benefit will run.

In order that the benefit of a covenant may run with the land at law<sup>1</sup> it must be of such a nature as to touch and concern the land<sup>2</sup>; that is, it must either affect the land as regards mode of occupation, or it must be such as in itself, and not merely from collateral circumstances, affects the value of the land<sup>3</sup>. If it fulfils that condition, the benefit of the covenant can run at law with land retained by the vendor and subsequently disposed of by him<sup>4</sup> to successors in title holding

the same or a derivative legal estate<sup>5</sup>. If it does not fulfil these conditions, it is a personal covenant, and is binding only between the parties and their personal representatives<sup>6</sup>.

A covenant may be expressed so as to be merely personal, and then, whether collateral or not, it binds only the covenantor and his personal representatives<sup>7</sup>.

It is not essential to the running of the benefit of a covenant with land that the covenantor should have had an interest in the land to be bound by the covenant<sup>8</sup>.

1 In general it is also true of restrictive covenants that the benefit of them will not run with particular land unless they touch and concern the land, in the sense that the land must be capable of being benefited by them: see *Re Ballard's Conveyance* [1937] Ch 473 at 480, [1937] 2 All ER 691 at 696; *Marquess of Zetland v Driver* [1939] Ch 1 at 8, [1938] 2 All ER 158 at 161, CA. There is no difference between law and equity in construing covenants to see whether their benefit is so annexed as to run with land: see *Rogers v Hosegood* [1900] 2 Ch 388 at 397, CA, per Farwell J. As to the annexation of the benefit of a restrictive covenant to the whole or to each and every part of the land to be benefited see EQUITY vol 16(2) (Reissue) PARA 622. As to the running of the benefit of a covenant for title see PARA 342 post.

2 *Austerberry v Oldham Corpn* (1885) 29 ChD 750 at 776, CA; *Rogers v Hosegood* [1900] 2 Ch 388 at 395, 407, CA; *Re Ballard's Conveyance* [1937] Ch 473 at 480, [1937] 2 All ER 691 at 696; *Marquess of Zetland v Driver* [1939] Ch 1 at 7, [1938] 2 All ER 158 at 161, CA. But see PARA 331 ante.

3 *Congleton Corpn v Pattison* (1808) 10 East 130 at 135; *Rogers v Hosegood* [1900] 2 Ch 388 at 395, CA; *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500 at 507, [1949] 2 All ER 179 at 184, CA. A covenant that runs with the land of the covenantee may by virtue of the Law of Property Act 1925 s 78 be enforceable by successors in title, such as, for example, a yearly tenant: see *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* supra at 510-511 and at 186; *Williams v Unit Construction Co Ltd* (1951) (unreported; but see 19 Conv NS 262), CA; *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 All ER 371, [1980] 1 WLR 594, CA; *Roake v Chadha* [1983] 3 All ER 503, [1984] 1 WLR 40; *J Sainsbury plc v Enfield London Borough Council* [1989] 2 All ER 817, [1989] 1 WLR 590. See also EQUITY vol 16(2) (Reissue) PARA 618.

4 *Austerberry v Oldham Corpn* (1885) 29 ChD 750, CA; *Rogers v Hosegood* [1900] 2 Ch 388 at 404, CA. See also the seventh resolution in *Spencer's Case* (1583) 5 Co Rep 16a at 17b; 1 Smith LC (13th Edn) 84, 94; and EQUITY vol 16(2) (Reissue) PARA 613.

5 *Rogers v Hosegood* [1900] 2 Ch 388 at 404, CA; *Webb v Russell* (1789) 3 Term Rep 393. These cases show that the benefit of a covenant entered into with a mortgagor, who, at that date, had no legal estate, did not run with the land at law, although the position in equity was different: *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500, [1949] 2 All ER 179, CA; *Williams v Unit Construction Co Ltd* (unreported; but see 19 Conv NS 262), CA.

6 Such a covenant is collateral and personal: *Rogers v Hosegood* [1900] 2 Ch 388 at 407, CA; *Formby v Barker* [1903] 2 Ch 539 at 551, CA.

7 See *Re Fawcett and Holmes' Contract* (1889) 42 ChD 150, CA; *Re Royal Victoria Pavilion, Ramsgate, Whelan v FTS (Great Britain) Ltd* [1961] Ch 581, [1961] 3 All ER 83 (covenant to procure that property should not be used in a particular manner).

8 *Smith and Snipes Hall Farm Ltd v River Douglas Catchment Board* [1949] 2 KB 500 at 505, 512, [1949] 2 All ER 179 at 184, 187, CA.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/4. POSITION OF THE PARTIES AFTER COMPLETION/(1) BENEFITS ENJOYED WITH THE PROPERTY SOLD/(ii) Right to Benefit of Covenants running with the Land/333. Burden of covenant.

### 333. Burden of covenant.

Save in cases arising between landlord and tenant, the burden of a covenant relating to the use or enjoyment of land does not run with the land at law<sup>1</sup>. Further, where the covenant is positive in substance, and can only be complied with by the expenditure of money, the burden does not run with the land in equity<sup>2</sup>. The covenantee may validly reserve a right of re-entry exercisable

on failure by the original covenantor or his successors to observe the covenant. Such a right of re-entry creates an equitable interest which is not registrable as a land charge affecting unregistered land, and which will be enforceable within the limits prescribed by the rule against perpetuities<sup>3</sup>.

Subject to the requirement of registration<sup>4</sup>, however, the burden of restrictive covenants runs with the land in equity<sup>5</sup>.

An obligation to fulfil the stipulation of a deed, where, for example, contribution to expenses is a corollary of taking benefits, may become binding on successors in title, because it is a principle of law that he who takes the benefit of a deed is bound by a condition contained in the deed<sup>6</sup>.

1 *Austerberry v Oldham Corpn* (1885) 29 ChD 750, CA, overruling on this point *Cooke v Chilcott* (1876) 3 ChD 694. Cf *Haywood v Brunswick Building Society* (1881) 8 QBD 403 at 409, CA; *Re Woking UDC (Basingstoke Canal) Act 1911* [1914] 1 Ch 300, CA, where the burden of obligations imposed by a private Act upon a company was held not to run with the land after dissolution of the company; *E and GC Ltd v Bate* (1935) 79 L Jo 203; *Jones v Price* [1965] 2 QB 618, [1965] 2 All ER 625, CA. Exceptionally, a customary duty to maintain fences or walls to keep out animals can exist as an easement and thus bind the land: see *Crow v Wood* [1971] 1 QB 77, [1970] 3 All ER 425, CA; *Egerton v Harding* [1975] QB 62, [1974] 3 All ER 689, CA; and EASEMENTS AND PROFITS A PRENDRE. There are also exceptional instances where by statute positive obligations are made to run with land, for example undertakings given to a London borough council pursuant to the Greater London Council (General Powers) Act 1974 s 16 (as amended): see LONDON GOVERNMENT. A covenant to contribute to the cost of repairs to roads, sea walls and sewers does not run with land so as to bind successors in title: *Halsall v Brizell* [1957] Ch 169 at 182, [1957] 1 All ER 371 at 377. See, however, the text and note 6 infra.

2 *Haywood v Brunswick Building Society* (1881) 8 QBD 403, CA. See also *Smith v Colbourne* [1914] 2 Ch 533, CA, where a covenant to remove windows erected under a licence was held unenforceable against subsequent purchasers; and a right of entry for the adjoining owner to remove them was apparently void for perpetuity. As to the law in Scotland see *Anderson v Dickie* (1915) 84 LJPC 219, HL.

3 *Shiloh Spinners Ltd v Harding* [1973] AC 691, [1973] 1 All ER 90, HL. In the case of registered land, the right of re-entry will require to be protected on the register. As to relief against forfeiture for breach of covenant see EQUITY vol 16(2) (Reissue) PARA 804. As to the rule against perpetuities see PERPETUITIES AND ACCUMULATIONS vol 35 (Reissue) PARA 1040.

4 See EQUITY vol 16(2) (Reissue) PARA 620; LAND CHARGES vol 26 (2004 Reissue) PARA 635; LAND REGISTRATION.

5 See EQUITY vol 16(2) (Reissue) PARA 613 et seq. It is doubtful whether or not a covenant restraining alienation will run on this principle: see *Caldy Manor Estate Ltd v Farrell* [1974] 3 All ER 753, [1974] 1 WLR 1303, CA, where this point was left open; and cf *Noble and Wolf v Alley* [1951] SCR 64, [1951] 1 DLR 321, Can SC, where it was held that such a covenant does not run with the land.

6 *Halsall v Brizell* [1957] Ch 169 at 182, [1957] 1 All ER 371 at 377. See also DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 64. Further, there is also a 'pure' doctrine of benefit and burden, independent of the doctrine of conditional benefits and burdens. The pure doctrine will apply, and impose the obligation on a successor in title, where the circumstances in which the successor came into the transaction show that the doctrine was intended to apply: see *Tito v Waddell (No 2)* [1977] Ch 106 at 289-311, [1977] 3 All ER 129 at 280-298.

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### 334. Covenants in leases.

Where the purchase is of the reversion on a lease, the purchaser is entitled to enforce the lessee's covenants, and is bound by the lessor's covenants concerning the land, and may take advantage of the conditions of the lease<sup>1</sup>. Where the assignment to the purchaser comprises part only of the demised premises, so that the reversion on the term is severed, the purchaser

is entitled to enforce the covenants and take advantage of the conditions so far as they relate to the land assigned<sup>2</sup>.

1 See generally LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 567-570 (benefit of lessee's covenants running with reversion), 483 (burden of lessor's covenants running with reversion). In relation to leases created on or after 1 January 1996, these matters are governed by the Landlord and Tenant (Covenants) Act 1995: see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 578 et seq. As to the purchaser's right to recover rent see PARA 327 ante.

2 See LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 555.

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### **335. Right of persons not parties to take benefit of covenants.**

A person may take the benefit of a covenant or agreement respecting land although he may not be named as a party to the instrument by which the disposition is made<sup>1</sup>, provided that he is a person with whom the covenant or agreement purports to be made<sup>2</sup>.

1 See the Law of Property Act 1925 s 56(1), which appears to relate only to covenants of which the benefit runs with the land (see generally DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 61; EQUITY vol 16(2) (Reissue) PARA 618) and applies only to land (see *Beswick v Beswick* [1968] AC 58, [1967] 2 All ER 1197, HL). As to the right of persons not parties to take interests in land see PARA 283 ante.

2 See *Marquess of Zetland v Driver* [1937] Ch 651 at 657, [1937] 3 All ER 795 at 801; revsd without affecting this point [1939] Ch 1, [1938] 2 All ER 158, CA. See also PARA 283 note 2 ante; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 61.

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## **(2) COVENANTS FOR TITLE**

### **(i) In general**

#### **336. Protection afforded.**

In the transfer of the property the vendor usually enters into covenants for title<sup>1</sup>, in pursuance of his obligation to give a title clear of defects and incumbrances, unless otherwise provided by the contract<sup>2</sup>. While the contract remains executory, the purchaser can decline to complete unless a proper title is made out<sup>3</sup>, but after completion he cannot, on the ground of adverse claims, recover money which has been paid or detain money unpaid, and must rely on the covenants for title<sup>4</sup>.

1 See also PARA 293 et seq ante. The fact that the vendor cannot show a complete chain of previous covenants for title is not an objection to his title: *Re Scott and Alvarez's Contract, Scott v Alvarez* [1895] 1 Ch 596 at 606, CA. The care with which titles are investigated makes it unusual for a purchaser to require to sue on

the covenant, and it has been said that more value is attached to covenants for title than they are worth; but at the same time much care is taken to secure the widest covenants which the circumstances permit and even to take an express covenant where no covenant will be implied. The most comprehensive covenants are those implied when the vendor sells with full title guarantee on or after 1 July 1995: see PARAS 349-351 post. As to covenants for title on the disposition of registered land see LAND REGISTRATION vol 26 (2004 Reissue) PARAS 972-975. See also *AJ Dunning & Sons (Shopfitters) Ltd v Sykes & Son (Poole) Ltd* [1987] Ch 287, [1987] 1 All ER 700, CA. As to the effect of the word 'grant' in a conveyance or transfer of superfluous land under the Lands Clauses Consolidation Act 1845 see s 132; and COMPULSORY ACQUISITION OF LAND vol 18 (2009) PARA 906. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 See PARA 137 ante. An agreement to sell the fee simple, free from incumbrances, carries with it the right of the purchaser to proper covenants: *Church v Brown* (1808) 15 Ves 258 at 263.

3 See PARA 137 ante.

4 See PARA 353 post.

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### **337. Reform of the law relating to statutory covenants for title.**

The law relating to the statutory covenants for title was significantly changed by legislation which came into force on 1 July 1995<sup>1</sup>. Dispositions made before that date continue to be governed by the old law<sup>2</sup>; dispositions made on or after that date are governed by the new law<sup>3</sup>.

1 The Law of Property (Miscellaneous Provisions) Act 1994 Pt I (ss 1-13): see PARAS 349-351 post.

2 The Law of Property Act 1925 s 76 (as amended), Sch 2 Pts I-VI (as amended). These provisions were repealed in relation to dispositions of property made on or after 1 July 1995 by the Law of Property (Miscellaneous Provisions) Act 1994 ss 10(1), 21(2), (3), Sch 2. As to the old law see PARAS 338-348 post. See also PARA 349 note 2 post.

3 As to the new law see PARAS 349-351 post. As to transitional provisions see the Law of Property (Miscellaneous Provisions) Act 1994 ss 10-13; and PARA 349 note 2 post.

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## **(ii) Dispositions made before 1 July 1995**

### **A. COVENANTS IMPLIED BY STATUTE**

#### **338. Implied covenants.**

It was formerly the practice not to give full express covenants for title in a conveyance<sup>1</sup> but to rely on the covenants on the part of the person conveying which are implied by statute where that person conveys and is expressed to convey as beneficial owner<sup>2</sup>, settlor<sup>3</sup>, trustee, mortgagee or personal representative of a deceased person, or under an order of the court<sup>4</sup>.

On a conveyance of freeholds for valuable consideration, other than a mortgage<sup>5</sup>, by a person who conveys and is expressed to convey as beneficial owner<sup>6</sup>, the covenants implied by statute

are covenants (1) for right to convey<sup>7</sup>; (2) for quiet enjoyment<sup>8</sup>; (3) for freedom from incumbrances<sup>9</sup>; and (4) for further assurance<sup>10</sup>. If the property is leasehold, similar covenants are implied and also covenants that the lease is valid and subsisting, and that the rent and lessee's covenants have been paid and performed to date<sup>11</sup>. The covenants implied by statute on a conveyance by a person conveying as beneficial owner are not absolute, but are limited to acts done by the person who conveys or any one through whom he derives title otherwise than by purchase for value<sup>12</sup>. The express covenants formerly included in conveyances were normally similarly limited<sup>13</sup>.

On any conveyance by a person who conveys and is expressed to convey as a trustee<sup>14</sup> or personal representative of a deceased person<sup>15</sup> or under an order of the court or as mortgagee, the only covenant implied is a covenant against incumbrances created by himself<sup>16</sup>.

These implied covenants for title may be varied or extended by a deed or assent<sup>17</sup>. Where it is intended to modify them, the modification should be clearly expressed in the conveyance<sup>18</sup>. A proviso destroying and not merely qualifying a covenant is void<sup>19</sup>.

Where the sole survivor of joint tenants or his personal representative conveys as beneficial owner or as personal representative, he is deemed in favour of a purchaser to be or to have been solely and beneficially interested<sup>20</sup>.

1 For these purposes, 'conveyance' does not include a demise by way of lease at a rent, but does include a charge (Law of Property Act 1925 s 76(5)), as well as a mortgage, any other lease, an assent, vesting declaration, vesting instrument, disclaimer, release and any other assurance of property or an interest in it by any instrument except a will (see s 205(1)(ii)). The provisions of s 76 (as amended) apply to conveyances made after 1881, but only to assents by personal representatives made after 1925: see s 76(8). As to the running of the benefit of a covenant for title see PARA 342 post.

As to the repeal of the Law of Property Act 1925 s 76 (as amended), Sch 2 Pts I-VI (as amended) in relation to dispositions of property made on or after 1 July 1995 see PARA 337 ante. As to dispositions made on or after 1 July 1995 see PARAS 349-351 post.

As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 See *ibid* s 76(1)(A), Sch 2 Pt I (conveyance for valuable consideration, other than a mortgage: see the text and notes 5-10 *infra*); s 76(1)(B), Sch 2 Pt II (conveyance of leasehold property for valuable consideration, other than a mortgage); s 76(1)(C), Sch 2 Pt III (conveyance by mortgage or charge: see MORTGAGE vol 77 (2010) PARAS 446, 447); and s 76(1)(D), Sch 2 Pt IV (conveyance by mortgage or charge of freehold property subject to a rent or of leasehold property: see MORTGAGE vol 77 (2010) PARA 101 et seq). As to the significance of the term 'beneficial owner' see note 6 *infra*.

3 See *ibid* s 76(1)(E), Sch 2 Pt V (conveyance by way of settlement: see SETTLEMENTS vol 42 (Reissue) PARA 690).

4 See *ibid* s 76(1)(F), Sch 2 Pt VI (s 76(1)(F) and Sch 2 Pt VI both amended by the Mental Health Act 1959 s 149(2), Sch 8 Pt I) (any conveyance: see the text and notes 14-16 *infra*). Where a person is not expressed to convey in any of the capacities mentioned in the text, no covenant as to title is implied by virtue of the Law of Property Act 1925 s 76 (as amended): s 76(4) (amended by the Mental Health Act 1959 Sch 8 Pt I).

5 As to the covenants for title implied in a mortgage see the Law of Property Act 1925 s 76(1)(C), (D), Sch 2 Pts III, IV; note 2 *supra*; and MORTGAGE vol 77 (2010) PARA 223.

6 It seems that the covenants are implied only when the grantor is in fact a beneficial owner and conveys as such: see *Pilkington v Wood* [1953] Ch 770 at 777, [1953] 2 All ER 810 at 813 per Harman J. See also *Fay v Miller, Wilkins & Co* [1941] Ch 360 at 362, [1941] 2 All ER 18 at 23, CA, per Greene MR; *Re Robertson's Application* [1969] 1 All ER 257n at 258, [1969] 1 WLR 109 at 112 per Megarry J. A different view was expressed in *Re Ray* [1896] 1 Ch 468 at 474-475, CA, per Kay LJ, who said that such words as 'beneficial owner' were merely a compendious means of bringing particular covenants into a conveyance. See also *David v Sabin* [1893] 1 Ch 523, CA (tenant for life expressed to convey as beneficial owner); *Wise v Whitburn* [1924] 1 Ch 460 (trustees expressed to convey as personal representatives); *Parker v Judkin* [1931] 1 Ch 475, CA (personal representatives expressed to convey as beneficial owners). The practice now, where there is a doubt whether the covenants will be implied, is to insert an express covenant that the covenants are to be implied as if the conveying party were a beneficial owner (or trustee etc) and was expressed to convey and did convey as such. Alternatively, the vendor could covenant in the terms set out in the relevant part of the Law of Property Act 1925 Sch 2 (as amended). A liquidator or receiver is sometimes expressed to convey as trustee (or mortgagee),

but it would seem preferable for express covenants to be given. Where a person is expressed to convey by direction of a person expressed to direct as beneficial owner, the person giving the direction is deemed to convey and to be expressed to convey as beneficial owner: s 76(2). Special provision is made for cases where a wife conveys and is expressed to convey as beneficial owner and her husband also conveys and is expressed to convey as beneficial owner (s 76(3)), but this provision is virtually obsolete, since a wife can now dispose of her property without the concurrence of her husband (see MATRIMONIAL AND CIVIL PARTNERSHIP LAW).

7 As to the covenant for right to convey see PARAS 343-344 post.

8 As to the covenant for quiet enjoyment see PARA 345 post.

9 As to the covenant for freedom from incumbrances see PARA 346 post.

10 See the Law of Property Act 1925 s 76(1)(A), Sch 2 Pt I; and note 2 supra. As to the covenant for further assurance see PARAS 347-348 post. As to covenants implied on the sale of land subject to a rentcharge see PARA 293 ante. As to restrictions on the creation of rentcharges see the Rentcharges Act 1977 s 2 (as amended); and RENTCHARGES AND ANNUITIES vol 39(2) (Reissue) PARA 774 et seq.

11 See the Law of Property Act 1925 s 76(1)(A), (B), Sch 2 Pts I, II; note 2 supra; para 301 ante.

12 See *ibid* Sch 2 Pt I. See also *David v Sabin* [1893] 1 Ch 523 at 531, CA, where it was said that the covenants for right to convey, for quiet enjoyment, for freedom from incumbrances and for further assurance are parts of one entire covenant controlled by the introductory words of the enactment; *Chivers & Sons Ltd v Secretary of State for Air* [1955] Ch 585 at 597-598, [1955] 2 All ER 607 at 611-612. The words 'otherwise than by purchase for value' are not an exception from the covenant, but part of the covenant itself, and in an action for breach of the covenant the onus is on the plaintiff to prove that the act relied on as constituting the breach was done by a person from whom the defendant derived title otherwise than by purchase for value: *Stoney v Eastbourne RDC* [1927] 1 Ch 367, CA. Purchase for value does not include a conveyance in consideration of marriage: see the Law of Property Act 1925 Sch 2 Pt I. The covenants implied in a mortgage are not so limited: see MORTGAGE vol 77 (2010) PARA 223.

13 *David v Sabin* [1893] 1 Ch 523 at 532, CA. See also eg *Browning v Wright* (1799) 2 Bos & P 13 at 22; *Thackeray v Wood* (1865) 6 B & S 766 at 773, Ex Ch; Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 574; Davidson's Concise Precedents in Conveyancing (21st Edn, 1926) 143; 1 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 494-495; 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 670. For this purpose a settlement on marriage is not treated as made for value; the vendor claiming under such a settlement covenants against the acts of the settlor and his representatives (1 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 494), and this is the effect of the covenants implied by statute: see note 12 supra. Where a purchaser decided to accept a defective title, he was held to be entitled to unqualified covenants: see *Re Geraghty and Lyons' Contract* (1919) 53 ILT 57. See also *Page v Midland Rly Co* [1894] 1 Ch 11, CA; *Great Western Rly Co v Fisher* [1905] 1 Ch 316; and PARA 343 post. Where the covenants in the conveyance are not in accordance with the contract, the conveyance may be rectified: *Strait v Fenner* [1912] 2 Ch 504 at 518. See also *Butler v Mountview Estates Ltd* [1951] 2 KB 563, [1951] 1 All ER 693. As to rectification see PARAS 354-355 post. The vendor's covenant for title includes the acts and omissions of persons claiming through him: *David v Sabin* supra at 532. A lessee becoming purchaser is entitled as such to require of the vendor only such covenants as are appropriate between vendor and purchaser: *Paton v Brebner* (1819) 1 Bli 42 at 69, HL.

14 Tenants for life and co-owners normally convey as trustees: see PARAS 339-340 post.

15 The implied covenant applies to assents made after 1925 as well as to conveyances by deed: see the Law of Property Act 1925 s 76(1)(F), (8) (s 76(1)(F) as amended: see note 4 supra). It seems that the covenant is implied only where the vendor both conveys and is expressed to convey as personal representative: see *Fay v Miller, Wilkins & Co* [1941] Ch 360 at 362, [1941] 2 All ER 18 at 23, CA; and note 6 supra. It has been said that because the provisions of the Law of Property Act 1925 s 76(1)(F), Sch 2 Pt VI (both as amended) refer to the personal representative 'of a deceased person', the conveyance should be entered into as personal representative of the particular person deceased, and not merely as personal representative; but objection is not normally taken where the conveyance is simply 'as personal representative'; cf the statutory forms of conveyance and assents by personal representatives contained in Sch 5 Forms 5, 8, 9.

16 See *ibid* s 76(1)(F), Sch 2 Pt VI (both as amended: see note 4 supra). See also *Wise v Whitburn* [1924] 1 Ch 460 (assent by executors to bequest of premises prior to sale).

17 See the Law of Property Act 1925 s 76(7). As so varied or extended, a covenant is, so far as may be, to operate in the like manner, and with all the like incidents, effects, and consequences, as if the variations or extensions were directed by s 76 (as amended) to be implied: see s 76(7). The text here follows the statute, but the variation or extension is inserted in the actual conveyance or assent and there is no occasion for a separate deed.



18 See *Page v Midland Rly Co* [1894] 1 Ch 11, CA; *May v Platt* [1900] 1 Ch 616.

19 See *Watling v Lewis* [1911] 1 Ch 414; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 213.

20 See the Law of Property (Joint Tenants) Act 1964 s 1 (as amended); and PARA 74 ante. Where the new law applies (see PARAS 349-351 post), this provision is modified so that the survivor (or his personal representative) is deemed to be solely and beneficially interested only if the transfer includes a statement that he is so interested: see PARA 74 ante.

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### 339. Tenant for life.

Where a tenant for life sells under his statutory powers<sup>1</sup>, he conveys as trustee, since the legal estate is vested in him on the trusts of the settlement<sup>2</sup>. Where an estate owner conveys under a special settlement made to overreach equitable interests, he should convey as beneficial owner<sup>3</sup>. This should also be done, it would appear, under an ordinary settlement where the estate owner is absolutely and beneficially entitled subject only to equitable interests which will be overreached by the conveyance.

1 As to the statutory powers of a tenant for life see SETTLEMENTS vol 42 (Reissue) PARA 775.

2 See SETTLEMENTS vol 42 (Reissue) PARA 775. Subject to certain exceptions, it has not been possible to create a new settlement under the Settled Land Act 1925 since the coming into force of the Trusts of Land and Appointment of Trustees Act 1996 on 1 January 1997: see REAL PROPERTY vol 39(2) (Reissue) PARA 65; SETTLEMENTS vol 42 (Reissue) PARA 676 et seq.

3 See PARA 272 ante.

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### 340. Co-owners etc.

Where the vendors are tenants in common or beneficial joint owners, they will be trustees of land and will usually convey as trustees<sup>1</sup>. If, however, being also beneficially entitled, they convey as beneficial owners, the liability may in the case of tenants in common be expressly restricted to their respective shares<sup>2</sup>.

In the case of a sub-purchase, the purchaser usually conveys to the sub-purchaser as trustee<sup>3</sup>.

1 See REAL PROPERTY vol 39(2) (Reissue) PARA 189 et seq, 207 et seq.

2 It has been said that in the case of joint tenants such a restriction is not warranted, since if the title of one is invalid the whole conveyance is invalid. As to the interests of the covenantors affecting the construction of the covenant as joint and several see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 260.

3 See PARA 280 note 3 ante.

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### **341. Vendors by whom no covenants for title are given.**

A purchaser from the Crown cannot require covenants for title<sup>1</sup>, and the official custodian for charities enters into no covenants<sup>2</sup>. It is not the general practice to give covenants for title in a voluntary conveyance<sup>3</sup> or in a conveyance where the vendor has only a possessory title<sup>4</sup>.

1 See CROWN PROPERTY vol 12(1) (Reissue) PARA 293.

2 See the Charities Act 1993 ss 2, 21, 22; and CHARITIES vol 8 (2010) PARAS 298-299. Although the official custodian will be named as a party to the conveyance, the managing trustees of the charity will normally execute the conveyance in his name and on his behalf: see s 22(2); and CHARITIES vol 8 (2010) PARA 279. As to the official custodian for charities see CHARITIES vol 8 (2010) PARA 297. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

3 Where a settlement is created, the grantor may convey as settlor: see PARA 350 ante; and SETTLEMENTS vol 42 (Reissue) PARA 690. If no settlement is created, it is doubtful whether the words 'as settlor' will imply any covenant: see PARA 338 note 4 ante.

Subject to certain exceptions, it has not been possible to create a new settlement under the Settled Land Act 1925 since the coming into force of the Trusts of Land and Appointment of Trustees Act 1996 on 1 January 1997: see REAL PROPERTY vol 39(2) (Reissue) PARA 65; SETTLEMENTS vol 42 (Reissue) PARA 676 et seq.

4 Where the contract provides that the purchaser is to accept such title as the vendor has, no action would lie if covenants for title were given and the title proved defective: *May v Platt* [1900] 1 Ch 616; *George Wimpey & Co Ltd v Sohn* [1967] Ch 487 at 509, [1966] 1 All ER 232 at 240, CA, per Russell LJ.

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### **342. Devolution of covenants for title.**

The burden of the covenants for title falls upon the covenantor (usually the vendor) personally, and after his death is enforceable, like any other liability, against his estate<sup>1</sup>. The benefit of the covenant runs with the purchaser's estate<sup>2</sup> and the covenant is enforceable by subsequent purchasers, provided they take that estate<sup>3</sup>. This is so in the case of express covenants for title<sup>4</sup>, and the same rule is applied by statute to the covenants implied<sup>5</sup> by the use of the statutory words<sup>6</sup>. Apparently the statutory covenants given on the conveyance of an equitable estate run with that estate; but express covenants for title only run with the legal estate, and the equitable owner must rely on his right to sue in the name of the covenantee or his assigns<sup>7</sup>. If on a subsequent sale the land has been sub-divided, a purchaser of part of the land who takes the estate of the original purchaser in that part is entitled to sue on the covenants in respect of his part<sup>8</sup>. Where the covenant for right to convey has been broken and the original covenantee has not sued on it, his successors in title may do so notwithstanding that it is not a continuing covenant<sup>9</sup>.

1 See 2 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 661. See also generally EXECUTORS AND ADMINISTRATORS. If the vendor becomes bankrupt, the liability is provable in the bankruptcy and if not proved will be discharged: see *Hardy v Fothergill* (1888) 13 App Cas 351, HL; *Davis v Tollemache* (1856) 2 Jur NS 1181; and

BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 493. As to the covenant for further assurance see PARA 347 post. Where the vendor is a company, and breach of a covenant for title comes to light only after the dissolution of the company, no action lies against the contributories: *Butler v Broadhead* [1975] Ch 97, [1974] 2 All ER 401.

2 As to the circumstances in which the benefit of a covenant will run with land generally see PARAS 331-332 ante.

3 Where the original conveyance has been obtained by fraud, an assignee for value without notice of the fraud can sue on the covenants for title, although the original covenantee could not do so: *David v Sabin* [1893] 1 Ch 523, CA. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

4 *Middlemore v Goodale* (1638) Cro Car 503; *King v Jones* (1814) 5 Taunt 418 (affd sub nom *Jones v King* (1815) 4 M & S 188) (covenant for further assurance); *Campbell v Lewis* (1820) 3 B & Ald 392 (covenant for quiet enjoyment). See also *Noke v Awder* (1595) Cro Eliz 373 at 436; *Rogers v Hosegood* [1900] 2 Ch 388 at 396, CA, per Farwell J. The covenantee should, however, have an estate in the land at the time of the covenant: 2 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 661. As to the necessity for the subsequent purchaser to take the estate of the original covenantee so as to create the privity of estate which enables the covenant to run with the land see *Roach v Wadham* (1805) 6 East 289 (a sale by a person with power to appoint was held to be an appointment and the purchaser's (appointee's) heir was not liable therefore on the covenant for rent in arrear); *Onward Building Society v Smithson* [1893] 1 Ch 1, CA (a conveyance of land was obtained by fraud and mortgaged to the plaintiffs, who were unable to sue the vendors on their covenants). Cf *Webb v Russell* (1789) 3 Term Rep 393 at 402.

5 See PARA 338 ante.

6 See the Law of Property Act 1925 s 76(6). The benefit of the implied covenant is annexed and incident to, and goes with, the estate or interest of the implied covenantee, and is capable of being enforced by every person in whom that estate or interest is, for the whole or any part of it, from time to time vested: s 76(6). See also *David v Sabin* [1893] 1 Ch 523, CA.

As to the repeal of the Law of Property Act 1925 s 76 (as amended) in relation to dispositions of property made on or after 1 July 1995 see PARA 337 ante.

7 See 1 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 676; *Rogers v Hosegood* [1900] 2 Ch 388 at 404, CA.

8 *Twynam v Pickard* (1818) 2 B & Ald 105; *Rogers v Hosegood* [1900] 2 Ch 388 at 396, CA. See also the Law of Property Act 1925 s 76(6); and note 6 supra.

9 *Kingdon v Nottle* (1815) 4 M & S 53, explained in *Spoor v Green* (1874) LR 9 Exch 99 at 111. See further PARA 343 post.

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## **B. PARTICULAR COVENANTS**

### **(A) COVENANT FOR RIGHT TO CONVEY**

#### **343. Nature of the covenant.**

The covenant for right to convey is a covenant for title, but the covenant for quiet enjoyment is a covenant relating to possession<sup>1</sup>. This distinction affects both the date when the covenant is broken and the measure of damages. A covenant for title is an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey<sup>2</sup>, and it is broken by the existence of an adverse right such as a right of way<sup>3</sup>, or any outstanding interest, charge or claim<sup>4</sup> which may prevent the purchaser from enjoying this estate<sup>5</sup>. There is also a breach where, by the vendor's omission to prevent the acquisition of an adverse title by

possession<sup>6</sup>, he has no title to part of the land which he purports to convey<sup>7</sup>. Hence the covenant for right to convey is not a continuing covenant, but is broken once and for all at the time of the conveyance if there is then a defect in title which prevents the vendor from conveying the estate which he purports to convey<sup>8</sup>. Consequently time begins to run immediately against an action for breach of the covenant<sup>9</sup>. The purchaser can sue on the covenant notwithstanding that the defect in title is disclosed by a recital in the conveyance<sup>10</sup>. The purchaser is entitled to a conveyance expressed to be subject to such incumbrances as are mentioned in the contract<sup>11</sup>.

1 See *Howell v Richards* (1809) 11 East 633 at 642. For the early recognition of the distinction between covenants for title and possession see *Gregory v Mayo* (1677) 3 Keb 744 at 755. A covenant for seisin was treated as a covenant for lawful seisin, and was equivalent to a covenant for right to convey the estate expressed to be conveyed: *Gray v Briscoe* (1607) Noy 142; *Cookes v Fowns* (1661) 1 Keb 95; *Nervin v Munns* (1682) 3 Lev 46; *Browning v Wright* (1799) 2 Bos & P 13 at 27.

2 *Howell v Richards* (1809) 11 East 633 at 642. The covenant will not be qualified so as to extend to less than the interest expressed to be conveyed, unless such a qualification is clearly indicated: *May v Platt* [1900] 1 Ch 616, explaining *Delmer v McCabe* (1863) 14 ICLR 377.

3 *Turner v Moon* [1901] 2 Ch 825; *Great Western Rly Co v Fisher* [1905] 1 Ch 316 at 321.

4 See 2 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 1077-1078.

5 In an action on the covenant, it is necessary to plead the material facts alleged to constitute the breach.

6 See the Limitation Act 1980 ss 15, 17; and cf LIMITATION PERIODS vol 68 (2008) PARA 1016 et seq.

7 *Eastwood v Ashton* [1915] AC 900, HL; *Jackson v Bishop* (1979) 48 P & CR 57, CA; *AJ Dunning & Sons (Shopfitters) Ltd v Sykes & Son (Poole) Ltd* [1987] Ch 287, [1987] 1 All ER 700, CA.

8 *Turner v Moon* [1901] 2 Ch 825. The breach of such a covenant was spoken of as a continuing breach in *Kingdon v Nottle* (1815) 4 M & S 53 at 57; but see *Spoor v Green* (1874) LR 9 Exch 99 at 111 per Bramwell B, explaining *Kingdon v Nottle* supra.

9 *Spoor v Green* (1874) LR 9 Exch 99. See also LIMITATION PERIODS vol 68 (2008) PARA 977.

10 *Page v Midland Rly Co* [1894] 1 Ch 11, CA; *Great Western Rly Co v Fisher* [1905] 1 Ch 316 at 322; *Re Geraghty and Lyons' Contract* (1919) 53 ILT 57. See also DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 258-259. Generally, mere notice to the purchaser of a defect in title does not bar his right to recover: *Levett v Withrington* (1688) 1 Lut 317. As to the position in the case of registered land see the Land Registration Rules 1925, SR & O 1925/1093, r 77 (amended by SI 1995/377). As to registered land generally see LAND REGISTRATION.

11 *Re Wallis and Barnard's Contract* [1899] 2 Ch 515. The purchaser is subject to a wide range of incumbrances: see the Standard Conditions of Sale (3rd Edn), condition 3.1.2; and PARA 55 ante. The transfer is to have effect as if the disposition is expressly made subject to all matters to which the property is sold subject under the terms of the contract: condition 4.5.3. As to the Standard Conditions of Sale see PARA 1 note 9 ante. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

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### 344. Measure of damages.

The measure of damages is the difference between the value of the property as purported to be conveyed and its value as it actually passes to the purchaser<sup>1</sup>. Hence a purchaser who loses

the land can only recover the amount of the purchase money and not the value of subsequent improvements<sup>2</sup>.

1 *Turner v Moon* [1901] 2 Ch 825; *Eastwood v Ashton* [1913] 2 Ch 39 at 55 (revsd [1914] 1 Ch 68, CA, but restored [1915] AC 900, HL, the question of damages not being discussed on the appeals). In *Gray v Briscoe* (1607) Noy 142, copyhold was conveyed as freehold and the measure of damages was the difference between the values of the copyhold and freehold land. Cf *Wace v Bickerton* (1850) 3 De G & Sm 751. See also *Conodate Investments Ltd v Bentley Quarry Engineering Co Ltd* (1970) 216 Estates Gazette 1407. The value of the property as expressed to be conveyed is usually the amount of the purchase money stated in the conveyance, but this is not so if the purchase money does not correspond to the actual value: see *Jenkins v Jones* (1882) 9 QBD 128, CA. As to conditions providing for compensation for misdescription see PARA 110 ante.

As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 Rawle's A Practical Treatise on the Law of Covenants for Title (5th Edn, 1887) s 158.

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## (B) COVENANTS FOR QUIET ENJOYMENT AND FREEDOM FROM INCUMBRANCES

### 345. Covenant for quiet enjoyment.

The covenant for quiet enjoyment is a future covenant<sup>1</sup>. Consequently there is no breach of the covenant until the covenantee is disturbed in his enjoyment<sup>2</sup>. The implied covenant for quiet enjoyment extends to lawful interruption or disturbance by the person who conveys or any person conveying by his direction, or rightfully claiming by, through, under or in trust for the person who conveys or any person conveying by his direction, or by, through or under anyone (not being a person claiming in respect of an estate or interest subject to which the conveyance is expressly made) through whom the person who conveys derives title, otherwise than by purchase for value<sup>3</sup>. A covenant for quiet enjoyment limited to lawful disturbance by the covenantor or any person claiming under or in trust for him<sup>4</sup> is not broken by claims under title paramount to that of the covenantor, or by tortious acts other than those of the covenantor himself<sup>5</sup>. Since the covenant is a future covenant, the damages seem to be measured by the loss to the covenantee when the disturbance takes place. Thus, in case of eviction, the damages include the value of improvements which he has made<sup>6</sup>.

1 See *Ireland v Birchem* (1835) 2 Scott 207. The covenant for quiet enjoyment and the covenant for freedom from incumbrances are in effect a single covenant that the covenantee is to enjoy free from incumbrances: see PARA 346 post.

2 Whereas the covenant for right to convey is a covenant for title (see PARA 343 ante), that for quiet enjoyment is an assurance against disturbance consequent upon a defective title: *Howell v Richards* (1809) 11 East 633 at 641. See also *Conodate Investments Ltd v Bentley Quarry Engineering Co Ltd* (1970) 216 Estates Gazette 1407; and LIMITATION PERIODS vol 68 (2008) PARA 977.

3 See the Law of Property Act 1925 s 76(1)(A), Sch 2 Pt I; and PARA 338 ante. As to the repeal of the Law of Property Act 1925 s 76 (as amended), Sch 2 Pts I-VI (as amended) in relation to dispositions of property made on or after 1 July 1995 see PARA 337 ante.

As to the implied covenants for title generally see PARA 338 ante; and as to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

4 As to the effect of a covenant for quiet enjoyment, and the matters which constitute a breach of the covenant see *Young v Raincock* (1849) 7 CB 310; *Browne v Flower* [1911] 1 Ch 219. See also LANDLORD AND

TENANT vol 27(1) (2006 Reissue) PARA 508 et seq. As to covenants for quiet enjoyment in mining leases see MINES, MINERALS AND QUARRIES vol 31 (2003 Reissue) PARA 345. A judgment which does not interfere with the possession is not a breach: *Howard v Maitland* (1883) 11 QBD 695, CA; cf *Hunt v Danvers* (1680) T Raym 370. As to arrears of quit rent see *Howes v Brushfield* (1803) 3 East 491; and Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 602. As to disturbance under title paramount see also *Woodhouse v Jenkins* (1832) 9 Bing 431. After conveyance the court does not necessarily interfere by injunction to prevent illegal distress by the vendor on tenants: *Drake v West* (1853) 22 LJ Ch 375. In an action on the covenant for quiet enjoyment the plaintiff must allege the facts constituting the disturbance, and that the disturbance was lawful, with sufficient particularity to show the breach of covenant: *Foster v Pierson* (1792) 4 Term Rep 617. See also *Wotton v Hele* (1670) 2 Wms Saund 175 at 181 note (10).

5 See *Celsteel Ltd v Alton House Holdings Ltd (No 2)* [1987] 2 All ER 240, [1987] 1 WLR 291, CA; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 508-509.

6 This is in accordance with the ordinary rule as to damages, and is supported by *Bunny v Hopkinson* (1859) 27 Beav 565. See *Rolph v Crouch* (1867) LR 3 Exch 44; and cf *Duckworth v Ewart* (1863) 10 Jur NS 214. See also 2 Williams Law relating to Vendors and Purchasers of Real Estate and Chattels Real (4th Edn, 1936) 1090. A lessee, in case of eviction, recovers under the covenant for quiet enjoyment the value of the term to him: see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 519. See also Rawle's A Practical Treatise on the Law of Covenants for Title (5th Edn, 1887) s 169, where the result is explained on grounds peculiar to leases. However, the construction of the covenant should be the same whether it is in a lease or a conveyance on sale; and the rule as to leases supports the statement in the text. Where the improvements effected by the purchaser are in pursuance of the contract of sale (eg where he erects houses out of which the vendor is to receive a rent), there is additional reason for including in the damages the value of the buildings: Rawle's A Practical Treatise on the Law of Covenants for Title (5th Edn, 1887) s 170. In the absence of evidence of increase of value, the damages are the original value: *Jenkins v Jones* (1882) 9 QBD 128, CA. The damages may include the costs of litigation upon an adverse claim: *Sutton v Baillie* (1891) 65 LT 528; and see 2 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 674 et seq. See also LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 519. As to mental distress as a head of damage, and as to the possibility of aggravated or exemplary damages where the vendor's wrongful conduct is also a tort, see DAMAGES vol 12(1) (Reissue) PARA 1113 et seq; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 519.

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### 346. Covenant for freedom from incumbrances.

In the covenants for title implied by statute on a conveyance for valuable consideration as beneficial owner<sup>1</sup>, the covenant against incumbrances follows the covenant for quiet enjoyment as part of it<sup>2</sup>. The covenant against incumbrances is consequently a future covenant, like the covenant for quiet enjoyment<sup>3</sup>, and the two are in effect a single covenant that the covenantee is to enjoy the land free from incumbrances<sup>4</sup>. The mere existence of an incumbrance does not give the right to sue on the covenant against incumbrances; there must be interruption of enjoyment by a claim or demand on the purchaser<sup>5</sup>.

An incumbrance has been said to be every right to or interest in the land which may subsist in third persons to the diminution in the value of the land, but consistent with the passing of the fee in the conveyance<sup>6</sup>. It will include a mortgage<sup>7</sup>, charge or lien capable of being enforced against the purchaser, an easement and a subsisting term, unless, in the case of a term, the real subject of the purchase was the reversion on the term<sup>8</sup>, and probably also a restrictive covenant enforceable against the purchaser<sup>9</sup>. Apart from the effect of the statutory provisions as to the registration of local land charges or of any relevant conditions contained in the contract for sale<sup>10</sup>, the question whether expenses payable to a local authority in respect of work done under statutory powers constitute an incumbrance depends upon whether the expenses are merely a liability of the landowner personally<sup>11</sup> or are charged upon the land and whether, if they are a charge upon the land, the charge attached before completion<sup>12</sup>.

1 See PARA 338 ante. As to the covenants implied on a sale by a trustee, mortgagee, personal representative or settlor see PARA 338 ante. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 See the Law of Property Act 1925 s 76(1)(A), Sch 2 Pt I; and PARA 338 ante. As to the repeal of the Law of Property Act 1925 s 76 (as amended), Sch 2 Pts I-VI (as amended) in relation to dispositions of property made on or after 1 July 1995 see PARA 337 ante.

3 As to the covenant for quiet enjoyment see PARA 345 ante.

4 See *Vane v Lord Barnard* (1708) Gilb Ch 6 at 7; Rawle's A Practical Treatise on the Law of Covenants for Title (5th Edn, 1887) s 73 p 87 note (1).

5 *Nottidge v Dering*, *Raban v Dering* [1909] 2 Ch 647 at 656 (affd [1910] 1 Ch 297, CA); cf *Turner v Moon* [1901] 2 Ch 825.

6 Rawle's A Practical Treatise on the Law of Covenants for Title (5th Edn, 1887) s 75.

7 See eg *David v Sabin* [1893] 1 Ch 523, CA. As to the mortgages which are registrable as land charges and the effect of failure to register see LAND CHARGES vol 26 (2004 Reissue) PARAS 629, 643; MORTGAGE vol 77 (2010) PARA 260.

8 See Rawle's A Practical Treatise on the Law of Covenants for Title (5th Edn, 1887) s 78. See also *Haverington's Case* (1586) Owen 6. If the purchaser has paid off a mortgage or charge, or bought in an easement, he can recover the amount so paid and any expense which he has incurred, but until he has incurred some loss, it seems that he cannot sue on the covenant, since according to the English form, the covenant is a future covenant: see Rawle's A Practical Treatise on the Law of Covenants for Title (5th Edn, 1887) s 188 et seq.

9 See *Cato v Thompson* (1882) 9 QBD 616 at 618, CA; *Ellis v Rogers* (1885) 29 ChD 661 at 665, CA; cf *Phillips v Caldcleugh* (1868) LR 4 QB 159 at 163. As to the registration as land charges of restrictive covenants entered into after 1925 and the effect of failure to register see PARA 10 ante; and LAND CHARGES vol 26 (2004 Reissue) PARAS 635, 643.

10 See PARA 126 ante.

11 See *Egg v Blayney* (1888) 21 QBD 107, DC.

12 See *Re Bettsworth and Richer* (1888) 37 ChD 535; *Stock v Meakin* [1900] 1 Ch 683, CA; *Re Allen and Driscoll's Contract* [1904] 2 Ch 226, CA. See PARA 126 ante.

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## (C) COVENANT FOR FURTHER ASSURANCE

### **347. Effect of covenant for further assurance.**

Under the covenant for further assurance the vendor is bound to do such further acts for the purpose of perfecting the purchaser's title as the purchaser may reasonably require<sup>1</sup> and the vendor can properly do<sup>2</sup>. The purchaser should tender a draft of the further conveyance to which he considers that he is entitled<sup>3</sup>, and should tender or offer to pay the vendor's costs<sup>4</sup>. The vendor is entitled to a reasonable time to procure professional assistance<sup>5</sup>. If the conveyance is proper and the vendor declines to execute it or to do any act which the purchaser can properly require, this constitutes a breach of the covenant<sup>6</sup>. The purchaser cannot, by means of the covenant for further assurance, obtain a greater estate than that which was the subject of the original conveyance<sup>7</sup>, although if the vendor's title was defective the vendor may be required to assure an estate which he has got in since, whether by devise<sup>8</sup>

or by purchase<sup>9</sup>. No further assurance can be required where there was an estoppel created in favour of the purchaser which is fed by the vendor's subsequent acquisition of the legal estate<sup>10</sup>.

1 See Rawle's A Practical Treatise on the Law of Covenants for Title (5th Edn, 1887) s 99. Such acts include the removal of a judgment if charged on the land, or other incumbrance: *King v Jones* (1814) 5 Taunt 418 (affd sub nom *Jones v King* (1815) 4 M & S 188); *Re Jones, Farrington v Forrester* [1893] 2 Ch 461 at 471. As to a request for further assurance see *Bennet's Case* (1582) Cro Eliz 9 ('such assurance as purchaser's counsel should advise'; the vendor must be notified of such advice and given time to consider it). The vendor's death within the time limited ends the covenant: *Nash v Ashton* (1682) T Jo 195. Cf *Blicke v Dymoke* (1824) 2 Bing 105. The assurance must be necessary (*Warn v Bickford* (1819) 7 Price 550; subsequent proceedings (1821) 9 Price 43), and the execution of it possible (*Pet and Cally's Case* (1589) 1 Leon 304 (party mentally disordered); *Nash v Ashton* supra).

2 See *Heath v Crealock* (1874) 10 Ch App 22 at 31.

3 2 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 673. The draft is usually settled by counsel and accompanied by counsel's opinion as to the necessity and propriety of the further assurance, although this is not necessary: *Blicke v Dymoke* (1824) 2 Bing 105. Under the early form of covenant, the covenant was to make such assurance as the purchaser's counsel should advise: *Rosewell's Case* (1593) 5 Co Rep 19b; *Bennet's Case* (1582) Cro Eliz 9; *Baker v Bulstrode* (1674) 2 Lev 95; *Lassels v Catterton* (1670) 1 Mod Rep 67. As to the preparation of the conveyance or transfer see PARA 262 et seq ante. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

4 2 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 673. As to the costs of the conveyance see PARA 323 et seq ante.

5 *Bennet's Case* (1582) Cro Eliz 9.

6 Rawle's A Practical Treatise on the Law of Covenants for Title (5th Edn, 1887) s 99. In an action on the covenant, the facts showing the necessity and propriety for the further assurance, and the defendant's refusal to execute it, should be alleged.

7 *Davis v Tollemache* (1856) 2 Jur NS 1181.

8 *Smith v Baker* (1842) 1 Y & C Ch Cas 223. The devise would now have to be made effectual by assent: see EXECUTORS AND ADMINISTRATORS.

9 See *Taylor v Debar* (1676) 1 Cas in Ch 274; 2 Cas in Ch 212; *Otter v Lord Vaux* (1856) 6 De GM & G 638; Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 612. It seems that the vendor is under the same liability in equity, even apart from a covenant for further assurance: *Noel v Bewley* (1829) 3 Sim 103; *Smith v Osborne* (1857) 6 HL Cas 375; *Re Bridgwater's Settlement, Partridge v Ward* [1910] 2 Ch 342. See also EQUITY vol 16(2) (Reissue) PARA 645; ESTOPPEL vol 16(2) (Reissue) PARA 1033. Where, however, the covenant for further assurance is, with the other covenants, limited in the usual way to the acts of the vendor and his predecessors since the last sale, the vendor can, it seems, only be required to assure an after-acquired estate which is necessary to satisfy this limited covenant: Rawle's A Practical Treatise on the Law of Covenants for Title (5th Edn, 1887) s 104. A vendor tenant in tail who has conveyed a base fee (which would now be an equitable interest) may be required to turn it into a fee simple: *Bankes v Small* (1887) 36 ChD 716, CA; and see REAL PROPERTY vol 39(2) (Reissue) PARA 136. Probably a purchaser who has not obtained the title deeds cannot obtain a covenant for their production under the covenant for further assurance, but his equitable right to production is usually sufficient without a covenant: see *Hallett v Middleton* (1826) 1 Russ 243; *Fain v Ayers* (1826) 2 Sim & St 533; and PARA 299 ante. The vendor can be required to execute a duplicate of the conveyance if the original has been destroyed through his fault or handed by him to a sub-purchaser of part: see *Bennett v Ingoldsby* (1676) Cas temp Finch 262; *Napper v Lord Allington* (1700) 1 Eq Cas Abr 166. In such cases, either the conveyance should bear an indorsement showing that it is a duplicate, or it should be expressed to be merely a deed of confirmation: see 2 Dart's Law relating to Vendors and Purchasers (8th Edn, 1929) 673. The deed of further assurance should not itself contain additional covenants of title by the vendor: *Coles v Kinder* (1620) Cro Jac 571; *Lassels v Catterton* (1670) 1 Mod Rep 67; Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 615.

10 *Cumberland Court (Brighton) Ltd v Taylor* [1964] Ch 29, [1963] 2 All ER 536.



1995/B. PARTICULAR COVENANTS/(C) Covenant for Further Assurance/348. Remedy on the covenant.

### **348. Remedy on the covenant.**

The purchaser may either bring an action for breach of the covenant for further assurance, or sue for specific performance<sup>1</sup>. In the former case the damages are the loss arising to him from the neglect to execute the assurance<sup>2</sup>. In the event of the vendor's bankruptcy, specific performance of the covenant can be enforced against his trustee in bankruptcy, against the vendor himself after his discharge, and also against his assigns, except such as take the legal estate for value without notice<sup>3</sup>.

1 See Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 612. As to the remedy of specific performance see generally SPECIFIC PERFORMANCE.

2 See *King v Jones* (1814) 5 Taunt 418 (affd sub nom *Jones v King* (1815) 4 M & S 188), where the purchaser's heir, who had been evicted, was awarded the amount of the purchase money. However, since there is no breach until the refusal to execute the further assurance, the damages may, perhaps, be the value of the land at this time where that value differs in amount from the purchase money: see PARA 345 ante. The action may be brought at once upon breach of covenant, but it is better to wait until the ultimate damage has been sustained, provided the statutory time-limit for an action to recover land is not exceeded: *King v Jones* supra at 428. As to the statutory time-limit see the Limitation Act 1980 s 8; and cf LIMITATION PERIODS vol 68 (2008) PARA 975 et seq (action upon a specialty). See also ss 15, 17; and LIMITATION PERIODS vol 68 (2008) PARA 1016 et seq (action for recovery of land).

3 *Pye v Daubuz* (1792) 3 Bro CC 595; *Re Phelps, ex p Fripp* (1846) 1 De G 293. See also *Davis v Tollemache* (1856) 2 Jur NS 1181; and cf *Re Reis, ex p Clough* [1904] 2 KB 769 at 777, 781, CA (affd sub nom *Clough v Samuel* [1905] AC 442, HL) (covenant to settle after-acquired property).

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### **(iii) Dispositions made on or after 1 July 1995**

#### **349. Covenants implied by statute.**

Covenants for title are no longer implied on the basis of the capacity in which the vendor conveys and is expressed to convey<sup>1</sup>. In dispositions made on or after 1 July 1995 the nature of the covenants implied will depend on whether the disposition is expressed to be made with full title guarantee or with limited title guarantee<sup>2</sup>.

1 As to the old law see note 2 infra; and PARA 338 et seq ante. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 See the Law of Property (Miscellaneous Provisions) Act 1994 s 1(1), (2), (3). As to full title guarantee see PARA 350 post; and as to limited title guarantee see PARA 351 post. As to the covenants implied see Pt I (ss 1-13); and PARAS 350-351 post.

Where a contract was made before 1 July 1995, but completion took place on or after that date, the disposition will normally be governed by the old law contained in the Law of Property Act 1925 s 76 (as amended) and the Land Registration Act 1925 s 24(1)(a) (both repealed in relation to dispositions of property made on or after 1 July 1995): see the Law of Property (Miscellaneous Provisions) Act 1994 s 11; and cf s 12. See also the Land Registration Rules 1925, SR & O 1925/1093, r 77 (amended by SI 1995/377); and LAND REGISTRATION. As to options granted before 1 July 1995 and exercised after that date see the Law of Property (Miscellaneous Provisions) Act 1994 s 13.

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### **350. Dispositions made with full title guarantee.**

In an instrument effecting or purporting to effect a disposition of property<sup>1</sup>, and made with full title guarantee<sup>2</sup>, certain covenants are implied by statute<sup>3</sup>.

There is an implied covenant that the person making the disposition<sup>4</sup> (1) has the right (with the concurrence of any other person transferring the property) to dispose of the property as he purports to<sup>5</sup>; and (2) will at his own cost do all that he reasonably can to give the person to whom he disposes of the property the title he purports to give<sup>6</sup>. The latter obligation includes: (a) in relation to a disposition of a registered title, doing all that he can to ensure that the person to whom the disposition is made is entitled to be registered with at least the class of title registered immediately before the disposition; and (b) in relation to a disposition which gives rise to first registration of title, giving all reasonable assistance to establish to the satisfaction of the Chief Land Registrar the right of the person to whom the disposition is made to be registered as proprietor<sup>7</sup>. Subject to the terms of the instrument making the disposition, it is to be presumed (i) where the title to the interest is registered, that the disposition is of the whole of that interest; and (ii) where the title is not registered, that, if the disposition is of a leasehold interest, the disposition is of the whole unexpired term of the lease and, in any other case, is of the fee simple<sup>8</sup>.

There is also an implied covenant that the person making the disposition is disposing of the property free from all charges and incumbrances (whether monetary or not) and from all other rights exercisable by third parties, other than any charges, incumbrances or rights which he does not and could not reasonably be expected to know about<sup>9</sup>.

Where the disposition is of leasehold property, there is an implied covenant that the lease is subsisting at the date of the disposition, and that there is no subsisting breach of a condition or tenant's obligation, and nothing which at that time would render the lease liable to forfeiture<sup>10</sup>.

Where the disposition is a mortgage<sup>11</sup> of property subject to a rentcharge, or of leasehold land, there is an implied covenant that the mortgagor will fully and promptly observe and perform all the obligations relating to the rentcharge, or the obligations under the lease, as the case may be<sup>12</sup>.

The operation of any of these covenants may be limited or extended by a term in the instrument of disposition<sup>13</sup>.

The benefit of a covenant implied by virtue of these provisions is annexed and incident to, and goes with, the estate or interest of the person to whom the disposition is made; and is capable of being enforced by every person in whom that estate or interest is (in whole or in part) for the time being vested<sup>14</sup>.

1 'Instrument' includes an instrument which is not a deed: Law of Property (Miscellaneous Provisions) Act 1994 s 1(4). 'Disposition' includes the creation of a term of years: s 1(4). The disposition need not be made for valuable consideration: see s 1(1). 'Property' includes a thing in action and any interest in real or personal property: s 1(4). As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 The Standard Conditions of Sale (3rd Edn), condition 4.5.2 provides for a transfer with full title guarantee unless contrary provision is made. See also Special Condition 3. As to the Welsh equivalent of full title guarantee see the Law of Property (Miscellaneous Provisions) Act 1994 s 8(4)(a). As to the Standard Conditions of Sale see PARA 1 note 9 ante.

3 Ibid by *ibid* Pt I (ss 1-13). The provisions of the Law of Property Act 1925 ss 81, 83 (s 81 as amended) apply to a covenant implied by virtue of the Law of Property (Miscellaneous Provisions) Act 1994 Pt I as they apply to a covenant implied by virtue of the Law of Property Act 1925): Law of Property (Miscellaneous Provisions) Act 1994 s 8(2).

As to implied covenants in registered dispositions see the Land Registration Rules 1925, SR & O 1925/1093, rr 76A, 77A (both added by SI 1995/377); and LAND REGISTRATION vol 26 (2004 Reissue) PARA 969 et seq.

4 Where in an instrument effecting or purporting to effect a disposition of property a person is expressed to direct the disposition, the Law of Property (Miscellaneous Provisions) Act 1994 Pt I applies to him as if he were the person making the disposition: s 8(3).

5 Ibid s 2(1)(a). The person making the disposition is not liable under the covenant implied by virtue of this provision or by virtue of s 3 (see the text and note 9 *infra*) or s 4 (see the text and note 10 *infra*) in respect of any particular matter to which the disposition is expressly made subject: s 6(1). Property is sold subject to a range of incumbrances (see the Standard Conditions of Sale (3rd Edn), condition 3.1.2; and PARA 55 ante), and a transfer has effect as if the disposition is expressly made subject to the incumbrances (see condition 4.5.3; and PARA 343 note 11 ante).

Nor is the person making the disposition liable under such a covenant for anything (not falling within s 6(1)) which at the time of the disposition is within the actual knowledge, or which is a necessary consequence of facts that are then within the actual knowledge, of the person to whom the disposition is made: s 6(2). For this purpose, the Law of Property Act 1925 s 198 (as amended) (deemed notice by virtue of registration: see EQUITY vol 16(2) (Reissue) PARA 577; LAND CHARGES vol 26 (2004 Reissue) PARA 616) is to be disregarded: Law of Property (Miscellaneous Provisions) Act 1994 s 6(3).

6 Ibid s 2(1)(b).

7 See *ibid* s 2(2). As to the Chief Land Registrar see LAND REGISTRATION vol 26 (2004 Reissue) PARA 1066 et seq.

8 See *ibid* s 2(3).

9 See *ibid* s 3(1). See also note 5 *supra*. The covenant extends to liabilities imposed and rights conferred by or under any enactment, except to the extent that such liabilities and rights are, by reason of (1) being at the time of the disposition only potential liabilities and rights in relation to the property; or (2) being liabilities and rights imposed or conferred in relation to property generally, not such as to amount to defects of title: see s 3(2).

10 See *ibid* s 4(1). See also note 5 *supra*. If the disposition is the grant of an underlease, a reference to 'lease' means the lease out of which the underlease is created: see s 4(2).

In the case of a leasehold property, the operation of this covenant is qualified by the Standard Conditions of Sale (3rd Edn), condition 3.2.2, which provides that the property is sold subject to any subsisting breach of a condition or tenant's obligation relating to the physical state of the property which renders the lease liable to forfeiture. There is a similar qualification where a sub-lease is granted: see condition 3.3.3. See also PARA 174 ante.

11 For these purposes, 'mortgage' includes charge, and 'mortgagor' is to be construed accordingly: Law of Property (Miscellaneous Provisions) Act 1994 s 5(4).

12 See *ibid* s 5(1), (2), (3).

13 See *ibid* s 8(1).

14 Ibid s 7.

## UPDATE

### 350 Dispositions made with full title guarantee

NOTE 5--Moreover, where the disposition is of an interest the title to which is registered under the Land Registration Act 2002, that person is not liable under any of those covenants for anything (not falling within the Law of Property (Miscellaneous Provisions) Act 1994 s 6(1), (2)) which at the time of the disposition was entered in relation to that interest in the register of title under the Land Registration Act 2002:

Law of Property (Miscellaneous Provisions) Act 1994 s 6(4) (added by the Land Registration Act 2002 Sch 11 para 31(2)).

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/4. POSITION OF THE PARTIES AFTER COMPLETION/(2) COVENANTS FOR TITLE/(iii) Dispositions made on or after 1 July 1995/351. Dispositions made with limited title guarantee.

### **351. Dispositions made with limited title guarantee.**

Where the disposition<sup>1</sup> is expressed to be made with limited title guarantee, the implied covenants are similar to those implied in the case of dispositions made with full title guarantee<sup>2</sup>, except that the implied covenant to transfer free from third party rights<sup>3</sup> is modified. The implied covenant is that the person making the disposition has not since the last disposition for value (1) charged or incumbered the property<sup>4</sup> by means of any charge or incumbrance which subsists at the time when the disposition is made, or granted third party rights in relation to the property which so subsist; or (2) suffered the property to be so charged or incumbered or subjected to any such rights, and that he is not aware that anyone else has done so since the last disposition for value<sup>5</sup>. In other words, under this qualified covenant the vendor does not undertake liability for actions of a predecessor in title.

1 For the meaning of 'disposition' see PARA 350 note 1 ante. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 See PARA 350 ante.

3 See PARA 350 ante.

4 For the meaning of 'property' see PARA 350 note 1 ante.

5 Law of Property (Miscellaneous Provisions) Act 1994 s 3(3). As to the Welsh equivalent of limited title guarantee see s 8(4)(b).

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/4. POSITION OF THE PARTIES AFTER COMPLETION/(3) PARTIES' REMEDIES AFTER COMPLETION/(i) In general/352. Rectification or rescission.

## **(3) PARTIES' REMEDIES AFTER COMPLETION**

### **(i) In general**

#### **352. Rectification or rescission.**

Where, owing to mutual mistake, the transfer does not carry out the intention of the parties, it may be rectified<sup>1</sup>. Where the transaction has been induced by fraud or by mutual mistake of a fundamental character, in a proper case the court will order rescission of the sale even after transfer<sup>2</sup>. Where the transaction has been induced by an innocent misrepresentation, rescission can be ordered after transfer; but the court has a discretion to award damages in lieu of rescission<sup>3</sup>.

1 See PARAS 354-355 post. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

2 See PARA 356 et seq post. As to the repudiation of a sale before completion under the provisions of conditions of sale see PARA 239 et seq ante.

3 See the Misrepresentation Act 1967 ss 1(b), 2(2); para 356 post; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 817, 834.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/4. POSITION OF THE PARTIES AFTER COMPLETION/(3) PARTIES' REMEDIES AFTER COMPLETION/(i) In general/353. Damages, compensation or return of purchase money.

### **353. Damages, compensation or return of purchase money.**

After completion of the contract the transaction is generally at an end between vendor and purchaser, and no action can be maintained by either party against the other for damages or compensation on account of errors as to the quantity or quality of the thing sold<sup>1</sup>, except in so far as the purchaser may be entitled to sue on the covenants for title<sup>2</sup>, or on any express provision for compensation for errors of description<sup>3</sup>, or in respect of any breach of a warranty or collateral agreement<sup>4</sup> or for fraudulent or negligent misrepresentation<sup>5</sup>. The purchaser cannot on the ground of adverse claims recover purchase money which has been paid or detain money unpaid, but must rely on the covenants for title<sup>6</sup>. In the absence of covenants for title or so far as these do not apply, he is without remedy in relation to his purchase money<sup>7</sup>, unless he can obtain rescission on the ground of misrepresentation or mistake<sup>8</sup>.

1 The purchaser can be compelled to restore land of which he has taken possession and which is in excess of that transferred to him, notwithstanding that the error has arisen through the vendor's failure to mark out plots: *Marriott v Reid* (1900) 82 LT 369.

2 As to the covenants for title see PARA 336 et seq ante. As to the measure of damages on the breach of a covenant for right to convey see PARA 344 ante.

3 See PARAS 110 et seq, 250 ante.

4 See eg *Saunders v Cockrill* (1902) 87 LT 30, DC; *Lawrence v Cassel* [1930] 2 KB 83, CA (breaches of express agreements to complete houses in a workmanlike manner); *Miller v Cannon Hill Estates Ltd* [1931] 2 KB 113; *Jennings v Tavenor* [1955] 2 All ER 769, [1955] 1 WLR 932; *Hancock v BW Brazier (Anerley) Ltd* [1966] 2 All ER 901, [1966] 1 WLR 1317, CA (breaches of implied warranty of fitness on sale of house in course of erection (see PARA 48 ante)). Cf *De Lassalle v Guildford* [1901] 2 KB 215, CA (oral warranty collateral to lease that drains were in order). An award of damages is the proper remedy for a breach of a collateral contract: *Rutherford v Acton-Adams* [1915] AC 866 at 870, PC. An answer to a preliminary inquiry before contract is not a warranty: see PARA 5 ante. For the distinction between a warranty and a representation see CONTRACT vol 9(1) (Reissue) PARA 768; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 704.

5 As to actions for damages for fraudulent or negligent misrepresentation see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 789 et seq. As to the general principle that the contract merges in the transfer on completion see PARA 293 ante; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 187. See, however, the Standard Conditions of Sale (3rd Edn), condition 7.4; and PARA 123 ante. As to the Standard Conditions of Sale see PARA 1 note 9 ante. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

6 See *Maynard v Moseley* (1676) 3 Swan 651 at 653, where the point as to detention of unpaid purchase money was left open; *M'Culloch v Gregory* (1855) 1 K & J 286 at 291. It seems now to be settled that the purchaser can neither recover purchase money paid (*Craig v Hopkins* (1732) Mor Dict 16,623; *Bree v Holbech* (1781) 2 Doug KB 654; *Urmston v Pate* (1794) 4 Cru Dig 390; *Wakeman v Duchess of Rutland* (1797) 3 Ves 233 at 235 (affd sub nom *Duchess of Rutland v Wakeman* (1798) 8 Bro Parl Cas 145, HL); *Clare v Lamb* (1875) LR 10 CP 334; Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 549), nor detain purchase money unpaid (see *Thomas v Powell* (1794) 2 Cox Eq Cas 394, where the court declined to prevent payment out of court on the ground of an adverse claim; Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 551; Rawle's A

Practical Treatise on the Law of Covenants for Title (5th Edn, 1887) s 321). Probably, however, the purchaser can apply unpaid purchase money in discharging incumbrances which the vendor should have cleared: see *Tourville v Naish* (1734) 3 P Wms 307; *Lacey v Ingle* (1847) 2 Ph 413; Sugden's Law of Vendors and Purchasers (14th Edn, 1862) 552; and cf *Miller v Pridden* (1856) 3 Jur NS 78. As to damages for breach of a covenant for quiet enjoyment see PARA 345 ante.

7 *Bree v Holbech* (1781) 2 Doug KB 654; *Wakeman v Duchess of Rutland* (1797) 3 Ves 233 at 235. The purchaser takes the conveyance at his own risk, and upon eviction cannot recover the purchase money on the ground of failure of consideration (*Clare v Lamb* (1875) LR 10 CP 334); but he has been allowed to do so where the purchase has been completed without conveyance (*Cripps v Reade* (1796) 6 Term Rep 606, where, on a sale of leaseholds, the lease was handed over without assignment). See also *Johnson v Johnson* (1802) 3 Bos & P 162; and cf *Awbry v Keen* (1687) 1 Vern 472.

8 See *Bree v Holbech* (1781) 2 Doug KB 654; *Edwards v M'Leay* (1815) Coop G 308; *Hitchcock v Giddings* (1817) 4 Price 135; Co Litt 384a note. As to rescission even after completion and repayment of purchase money in cases of misrepresentation and mistake see PARA 356 et seq post.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/4. POSITION OF THE PARTIES AFTER COMPLETION/(3) PARTIES' REMEDIES AFTER COMPLETION/(ii) Rectification/354. Rectification in case of mutual mistake.

## (ii) Rectification

### 354. Rectification in case of mutual mistake.

The remedy of rectification is discussed principally elsewhere in this work<sup>1</sup>. Mutual mistake<sup>2</sup> arises where the transfer does not operate to carry out the intentions of the parties, for example where the land transferred is less<sup>3</sup> or more<sup>4</sup> than was comprised in the contract, or there is an error in the limitations<sup>5</sup>, or the vendor's covenants for title are wider than the contracting parties intended<sup>6</sup>, or the implied covenant for title is not consistent with all the terms of the contract<sup>7</sup>, or there has been a common mistake in the description of an easement<sup>8</sup>, or a covenant has been inserted to which the parties had not agreed<sup>9</sup>. In such circumstances, upon sufficient evidence of the mistake<sup>10</sup>, the court will rectify the transfer<sup>11</sup> and will direct that a copy of the order to rectify be indorsed on the transfer<sup>12</sup>. The fact that rectification would confer a tax advantage on one or other party is not a bar to relief<sup>13</sup>. The right to rectification is a mere equity, which, in the case of registered land, will be defeated by a purchaser for value of any interest without notice<sup>14</sup>.

1 See MISTAKE vol 77 (2010) PARA 57 et seq.

2 Rectification can normally be granted only where the mistake is mutual: see MISTAKE vol 77 (2010) PARA 57 et seq.

3 *White v White* (1872) LR 15 Eq 247, where it was held that the order for rectification was sufficient to pass the legal estate in the additional land, without a further conveyance. As to vesting orders see PARA 266 ante. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

4 *Beaumont v Bramley* (1822) Turn & R 41; *Marquess of Exeter v Marchioness of Exeter* (1838) 3 My & Cr 321; *Mortimer v Shortall* (1842) 2 Dr & War 363; *Beale v Kyte* [1907] 1 Ch 564. See also *Tyler v Beversham* (1674) Cas temp Finch 80; *Thomas v Davis* (1757) 1 Dick 301; *Leuty v Hillas* (1858) 2 De G & J 110.

5 *Re Bird's Trusts* (1876) 3 ChD 214; *Hanley v Pearson* (1879) 13 ChD 545. As to the effect of limitations after 1925 see REAL PROPERTY vol 39(2) (Reissue) PARAS 93 (passing of fee simple without words of limitation), 172 (abolition of rule in *Shelley's Case*, *Wolfe v Shelley* (1581) 1 Co Rep 93b).

6 *Coldcot v Hill* (1662) 1 Cas in Ch 15; *Feilder v Studley* (1673) Cas temp Finch 90; *Stait v Fenner* [1912] 2 Ch 504 at 516, 519, sub nom *Fenner v McNab* 107 LT 124.

7 *Butler v Mountview Estates Ltd* [1951] 2 KB 563, [1951] 1 All ER 693, where, on a sale, leaseholds (which by the contract were to be taken with full notice of the actual state and condition of the property as to the state of repair) were conveyed by the vendors 'as beneficial owners' without any modification, and the conveyance was rectified by allowing a modification of the implied covenants.

8 *Cowen v Truefitt Ltd* [1899] 2 Ch 309, CA.

9 *Rob v Butterwick* (1816) 2 Price 190, where the court ordered a fresh conveyance to be executed without the covenant objected to.

10 As to the evidence on which relief will be granted see MISTAKE vol 77 (2010) PARA 39. As to the rectification of a written instrument on oral evidence see PARA 355 post.

11 *Ellis v Hills and Brighton and Preston ABC Permanent Benefit Building Society* (1892) 67 LT 287.

12 *White v White* (1872) LR 15 Eq 247. The court may in a proper case treat the instrument as though it were already rectified: see MISTAKE vol 77 (2010) PARA 68.

13 *Re Colebrook's Conveyances, Taylor v Taylor* [1973] 1 All ER 132, [1972] 1 WLR 1397; *Re Slocock's Will Trusts* [1979] 1 All ER 358. As to the rectification of a voluntary transfer see MISTAKE vol 77 (2010) PARA 57 et seq. The negligence of the plaintiff or of his legal adviser in committing the mistake is not a bar to rectification: *Weeds v Blaney* (1977) 247 Estates Gazette 211, CA (citing *Monaghan County Council v Vaughan* [1948] IR 306; *Ball v Storie* (1823) 1 Sim & St 210).

14 *Smith v Jones* [1954] 2 All ER 823, [1954] 1 WLR 1089, where it was held that occupation by a tenant was not sufficient to give notice of his right to rectification of the lease. Cf *Blacklocks v JB Developments (Godalming) Ltd* [1982] Ch 183 at 195-196, [1981] 3 All ER 392 at 400-401 (registered title). In relation to registered title see the Land Registration Act 1925 s 70(1)(g); and LAND REGISTRATION vol 26 (2004 Reissue) PARA 940.

## UPDATE

### 354 Rectification in case of mutual mistake

TEXT--For 'registered land' in the last sentence read 'unregistered land'.

NOTE 14--Land Registration Act 1925 repealed and replaced by the Land Registration Act 2002; see LAND REGISTRATION.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/4. POSITION OF THE PARTIES AFTER COMPLETION/(3) PARTIES' REMEDIES AFTER COMPLETION/(ii) Rectification/355. Rectification of contract and transfer.

### 355. Rectification of contract and transfer.

The court may on oral evidence rectify both the written contract and the transfer so as to make them correspond to the true agreement between the parties<sup>1</sup>.

<sup>1</sup> See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 192, 196; MISTAKE vol 77 (2010) PARA 57 et seq. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

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### (iii) Rescission after Completion

### 356. Rescission for misrepresentation or mutual mistake.

The remedy of rescission is discussed generally elsewhere in this work<sup>1</sup>. If the transaction has been induced by fraud, or misrepresentation amounting to fraud<sup>2</sup>, or by mutual mistake of a fundamental character<sup>3</sup>, the court will order a re-transfer of the land sold<sup>4</sup>, and repayment of the purchase money with interest from the date of payment<sup>5</sup>. The purchaser will be entitled to the costs, charges and expenses incident to the purchase and transfer, including the costs of investigating the title<sup>6</sup>, and the costs of the action to set aside the transfer<sup>7</sup>. Where the misrepresentation is innocent, the execution of the transfer is not a bar to rescission<sup>8</sup>, but the court may in its discretion award damages in lieu of rescission<sup>9</sup>.

<sup>1</sup> See CONTRACT vol 9(1) (Reissue) PARA 986 et seq; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 812 et seq; MISTAKE vol 77 (2010) PARA 52 et seq.

<sup>2</sup> *Bree v Holbech* (1781) 2 Doug KB 654; *Berry v Armistead* (1836) 2 Keen 221; *Wilde v Gibson* (1848) 1 HL Cas 605 at 633; *Brownlie v Campbell* (1880) 5 App Cas 925 at 937, HL, per Lord Selborne LC; *Joliffe v Baker* (1883) 11 QBD 255 at 267, 269. It may be fraud if the vendor knows and conceals a fact material to the validity of the title: *Edwards v M'Leay* (1815) Coop G 308; on appeal (1818) 2 Swan 287. As to the meaning of 'fraud' in connection with representations and the state of mind on the part of the representor required to render a representation fraudulent see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 755 et seq. The plaintiff cannot obtain rescission if he was from the beginning aware of the matters complained of: see *Vigers v Pike* (1842) 8 Cl & Fin 562 at 650, HL. Rescission of the contract for misrepresentation was refused in *Wilde v Gibson* (1848) 1 HL Cas 605 (revsg *Gibson v D'Este* (1843) 2 Y & C Ch Cas 542 at 581) (right of way not disclosed). Rescission was, however, granted in *Smith v Harrison* (1857) 3 Jur NS 287 (puffer at auction sale); and *Tibbatts v Boulter* (1895) 73 LT 534 (failure to cure defect, for which purpose time had been allowed). See also PARA 41 et seq ante.

<sup>3</sup> *Brownlie v Campbell* (1880) 5 App Cas 925, HL; *Debenham v Sawbridge* [1901] 2 Ch 98, where a portion of the property was discovered to belong to a third person, but the error was not sufficient to justify rescission. Relief has been granted where, for example, it was discovered after completion that the property belonged to the purchaser (*Bingham v Bingham* (1748) 1 Ves Sen 126; *Cooper v Phibbs* (1867) LR 2 HL 149 at 164; *Jones v Clifford* (1876) 3 ChD 779 at 791), or that at the time of completion it had ceased to exist (*Hitchcock v Giddings* (1817) 4 Price 135). Cf *Okill v Whittaker* (1847) 2 Ph 338; *Re Tyrell, Tyrell v Woodhouse* (1900) 82 LT 675. See MISTAKE vol 77 (2010) PARA 40.

<sup>4</sup> *Edwards v M'Leay* (1818) 2 Swan 287. As to rescission after transfer in cases of misrepresentation see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 817. As to rescission after transfer in cases of mistake see MISTAKE vol 77 (2010) PARA 52 et seq. As to setting aside a transfer in cases of undue influence see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 839 et seq. As to undue influence see also EQUITY vol 16(2) (Reissue) PARA 417 et seq. As to the disposition of registered and unregistered land by transfer see PARA 262 note 2 ante.

<sup>5</sup> *Hart v Swaine* (1877) 7 ChD 42. See also MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 781.

<sup>6</sup> *Edwards v M'Leay* (1818) 2 Swan 287 at 289.

<sup>7</sup> *Berry v Armistead* (1836) 2 Keen 221.

<sup>8</sup> See the Misrepresentation Act 1967 s 1(b); and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 817.

<sup>9</sup> See *ibid* s 2(2); and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 834. See also *William Sindall plc v Cambridgeshire County Council* [1994] 3 All ER 932, [1994] 1 WLR 1016, CA. If the misrepresentor is unable to prove that he believed on reasonable grounds the truth of his representation, there is an independent right to damages: see the Misrepresentation Act 1967 s 2(1); and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 801. As to the measure of damages see PARAS 42, 256 ante; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 811.

## UPDATE

### 356 Rescission for misrepresentation or mutual mistake



NOTE 2--See *Corbett v Halifax plc* [2002] EWCA Civ 1849, [2003] 4 All ER 180 (rescission of contract refused; deception by purchaser directed only to vendor mortgagee does not entitle vendor mortgagor to set aside sale).

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/4. POSITION OF THE PARTIES AFTER COMPLETION/(3) PARTIES' REMEDIES AFTER COMPLETION/(iii) Rescission after Completion/357. Purchaser's liability to account.

### **357. Purchaser's liability to account.**

The purchaser must account for rents and profits and, if he has been in possession, is charged with an occupation rent<sup>1</sup>. If the rents and profits exceed the interest, and there are special circumstances to justify this course, the account is directed to be taken with periodical rests<sup>2</sup>. Credit is given to the purchaser for substantial repairs and lasting improvements<sup>3</sup>, and he is debited with deterioration<sup>4</sup>.

1 *Donovan v Fricker* (1821) Jac 165; *Trevelyan v White* (1839) 1 Beav 588; *Gresley v Mousley* (1859) 4 De G & J 78; *Haygarth v Wearing* (1871) LR 12 Eq 320. See also PARA 191 ante. Except, perhaps, where there has been fraud on the part of the purchaser, the account is not taken on the footing of wilful default: see *Howell v Howell* (1837) 2 My & Cr 478; *Parkinson v Hanbury* (1867) LR 2 HL 1 at 14 (the contrary decision in *Adams v Swarder* (1864) 2 De GJ & Sm 44 seems to be impliedly overruled).

2 *Donovan v Fricker* (1821) Jac 165; *Neesom v Clarkson* (1845) 4 Hare 97 at 105. See also *Press v Coke* (1871) 6 Ch App 645 at 651. As to taking accounts with rests see MORTGAGE vol 77 (2010) PARA 101 et seq. Interest on rents and profits is not charged: *Silkstone and Haigh Moor Coal Co v Edey* [1900] 1 Ch 167.

3 *Trevelyan v White* (1839) 1 Beav 588; *Neesom v Clarkson* (1845) 4 Hare 97. Old buildings, if incapable of repair, are valued as old materials; but otherwise as buildings standing: *Robinson v Ridley* (1821) 6 Madd 2.

4 *Ex p Bennett* (1805) 10 Ves 381 at 400.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/4. POSITION OF THE PARTIES AFTER COMPLETION/(3) PARTIES' REMEDIES AFTER COMPLETION/(iii) Rescission after Completion/358. Time for rescission.

### **358. Time for rescission.**

The claim to rescind must be made promptly<sup>1</sup>, and before the interests of third persons have intervened<sup>2</sup>. Moreover, it must be possible for the parties to the contract to be restored to their original position for the purchaser to receive back his purchase money<sup>3</sup> and for the vendor to receive back the property unimpaired<sup>4</sup>. Depreciation caused by the vendor himself is no bar to rescission<sup>5</sup>, nor is depreciation a bar where it can be made good by compensation<sup>6</sup>. However, the contract cannot be rescinded in part and stand good for the residue; if it cannot be rescinded as a whole, it cannot be rescinded at all<sup>7</sup>.

1 See EQUITY vol 16(2) (Reissue) PARA 917; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 835.

2 In this respect the principle is the same as where rescission of an executory contract is sought: see *Clough v London and North Western Ry Co* (1871) LR 7 Exch 26 at 35; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 832. The transfer, like the contract, is valid until the injured party elects to avoid it: see *United Shoe Machinery Co of Canada v Brunet* [1909] AC 330 at 337, PC; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 783. The right to rescind is a mere equity, which will be defeated by a purchaser for value of any interest without notice: *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265, Aust HC. The

claimant's occupation of the land would not usually be sufficient to give notice of the claim: cf *Smith v Jones* [1954] 2 All ER 823, [1954] 1 WLR 1089; *Blacklocks v JB Developments (Godalming) Ltd* [1982] Ch 183 at 195-196, [1981] 3 All ER 392 at 400-401 (registered land). In relation to registered land, however, the Land Registration Act 1925 s 70(1)(g) applies.

3 *Debenham v Sawbridge* [1901] 2 Ch 98.

4 *Clarke v Dickson* (1858) EB & E 148 at 154-155; *Western Bank of Scotland v Addie*, *Addie v Western Bank of Scotland* (1867) LR 1 Sc & Div 145 at 159, 165, HL; *Urquhart v Macpherson* (1878) 3 App Cas 831 at 837, PC; *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218 at 1278, HL; *Rees v De Bernardy* [1896] 2 Ch 437 at 446. If the right of rescission cannot be exercised, the injured party must have recourse to his remedy in damages for deceit, negligent misrepresentation at common law, or under the Misrepresentation Act 1967 s 2(2): see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 789 et seq.

5 See *Phosphate Sewage Co v Hartmont* (1877) 5 ChD 394, CA; *Rees v De Bernardy* [1896] 2 Ch 437 at 446.

6 *Lagunas Nitrate Co v Lagunas Syndicate* [1899] 2 Ch 392 at 456, CA. See further MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 831.

7 *Sheffield Nickel Co v Unwin* (1877) 2 QBD 214 at 223. As to the form and extent of relief by rescission generally see MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARAS 812-813.

## UPDATE

### 358 Time for rescission

NOTE 2--Land Registration Act 1925 repealed and replaced by the Land Registration Act 2002; see LAND REGISTRATION.

Halsbury's Laws of England/SALE OF LAND (VOLUME 42 (REISSUE))/4. POSITION OF THE PARTIES AFTER COMPLETION/(3) PARTIES' REMEDIES AFTER COMPLETION/(iii) Rescission after Completion/359-400. Parties to rescission.

### 359-400. Parties to rescission.

A right to rescind a sale or purchase of land may be enforced by the personal representatives of a contracting party, or by his trustee in bankruptcy<sup>1</sup>, and, in the case of the vendor, by his personal representatives, or, after assent<sup>2</sup>, his devisee<sup>3</sup>, or an assignee of his whole interest in the land<sup>4</sup>.

Conversely, a right of rescission may be exercised against the devisees or representatives<sup>5</sup>, the assigns, other than those purchasing for value without notice<sup>6</sup>, or the trustee in bankruptcy<sup>7</sup> of the opposite party<sup>8</sup>.

Where a misrepresentation is made to a purchaser who then resells the land and passes on the representation to the sub-purchaser, rescission is not available to the sub-purchaser unless it was the intention of the representor that the representation should be passed on<sup>9</sup>.

1 As to rights of action vesting in the trustee in bankruptcy see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 434 et seq. As to the powers of the trustee in bankruptcy generally see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 390 et seq.

2 See EXECUTORS AND ADMINISTRATORS.

3 See *Stump v Gaby* (1852) 2 De GM & G 623 at 630; *Gresley v Mousley* (1859) 4 De G & J 78.

4 See EQUITY vol 16(2) (Reissue) PARA 604. As to the avoidance of the assignment of rights of action see *Defries v Milne* [1913] 1 Ch 98, CA; and CHOSSES IN ACTION vol 13 (2009) PARAS 97-98; MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 821.

5 *Bridgman v Green* (1757) Wilm 58 at 64-65; *Huguenin v Baseley* (1807) 14 Ves 273 at 289; *Trevelyan v White* (1839) 1 Beav 588; *Charter v Trevelyan* (1844) 11 Cl & Fin 714, HL.

6 *Trevelyan v White* (1839) 1 Beav 588; *Charter v Trevelyan* (1844) 11 Cl & Fin 714, HL. See also PARA 358 note 2 ante; and EQUITY vol 16(2) (Reissue) PARA 567.

7 Cf *Re Shackleton, ex p Whittaker* (1875) 10 Ch App 446; *Re Eastgate, ex p Ward* [1905] 1 KB 465; *Tilley v Bowman Ltd* [1910] 1 KB 745 (cases relating to the sale of goods: see SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARA 154).

8 See further MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 822.

9 *Gross v Lewis Hillman Ltd* [1970] Ch 445, [1969] 3 All ER 1476, CA. See also PARA 42 ante; and MISREPRESENTATION AND FRAUD vol 31 (2003 Reissue) PARA 737.